

**The Need for English Contract Law to Develop
a
Stand Alone Doctrine of Unconscionability**

(an economics and behavioural study of the approaches to unconscionability in contract law, as they affect long-term relationships in the music industry, using the music industry to demonstrate a need for development in modern law).

Patricia Reece-Davies BA(Hons.)

**Submitted for Ph.D.
awarded by
De Montford University**

June 2000

SUMMARY and OBJECTIVES

The subject of this study is long-term, contract-based relationships, demonstrated through a variety of cases in the music industry. An alternative legal approach, the hypothetical doctrine of unconscionably constructed contracts, is propounded, compared with existing law and tested against prominent and recent cases.

Observational knowledge gained over fifteen years of experience and contact with writers, performers, managers, agents and lawyers, led to the study. Thus, that industry was specifically considered, although there may be other industries where the concept could be applied.

Because the relationships discussed are vulnerable to breakdown causing costly litigation, current rules and doctrines may fall short of providing adequate advice and governance to a needy business class.

Whatever the outcome, judicial ruling and cost to the various parties, cases with similar root cause and argument recur time and again, decade after decade. Neither side, creative nor corporate appears to learn enough from experience. Their inability to understand guidance and governance offered by the law is examined, as are other possible reasons for their apparent recalcitrance.

Relevant areas of contract law are found to be undue influence, restraint of trade and inequality of bargaining power. Underlying judicial concern over public policy and unconscionable behaviour is recognised as important.

Combined with the study of contract law theory and practices, is an examination of the nature of the parties, creative and corporate. Economic, personal and commercial factors which influence their behavioural patterns have been analysed. Economics analysis methodology combined with behavioural and personality analysis has led to an understanding of those aspects of long-term contractual conduct which are often the cause of relational breakdown.

The music industry is seen to be receptive to improvements offered by thoughtfully structured law. The parties anticipate intervention and attempt to utilise rules of law in building and severing their obligation to each other. Therefore, it is believed here that the hypothetical doctrine offered would give tighter definition, resulting in better practice in the preparation of contracts and reduce the frequency of costly litigation.

TABLE of CONTENTS

Introduction.....5

PART ONE

GENERAL RESEARCH and DISCUSSION

MUSIC INDUSTRY CONTRACTS and CONTRACTUAL RELATIONSHIPS

1:2 The Music Industry Contract, Comments on Its Development and Content 17

1:3 Music Industry Contractual Relationships, Comments on Sources of, and
Approaches to Problems..... 24

THE BASIS of the HYPOTHESIS

2: The Hypothetical Doctrine of Unconscionably Constructed Contracts..... 35

2:1 General..... 35

2:2 The Parties 35

2:3 General Scope 35

2:4 Suggested Conduct and The Terms of an Agreement..... 37

2:5 Advisors..... 38

2:6 What Follows and Why 40

THE CONCEPT of UNCONSCIONABILITY has a HISTORY

3: The Emergence, in English Contract Law, of the Principle of Unconscionability;
Judicial Recognition of Relational Subtleties..... 43

3:1 The Development of Judicial Attitudes..... 44

3:2 The Historical Progress of Unconscionability as a Legal Concept..... 45

3:3 From the Concept of ‘Not equal to Protecting himself’ There is Evidence of
Judicial Attempts to Create a Stand Alone Doctrine. 47

3:4 The Conceptualisation of Inequality of Bargaining Power – A Notion of Public
Policy..... 48

3:5 The Continued Development of the Pseudo-Rule, or Principle, of Inequality of
Bargaining Power 50

THE EFFECT of INEQUALITY of BARGAINING POWER

| | | |
|-----|--|----|
| 4: | The Difficulty in Defining the Status of the Parties When This is Used as a Measure to Justify Intervention at Law, And the Effect of the Principle of Inequality of Bargaining Power..... | 53 |
| 4:1 | Could Principal Parties Find Themselves Unacceptably Categorised into Classes of High Degree Incompetence? | 54 |
| 4:2 | Should The Source and Value of Independent Advice Have Measurable Accountability Toward Apportioning Blame and Responsibility?..... | 55 |

DEVELOPMENTS via UNDUE INFLUENCE

| | | |
|-----|--|----|
| 5: | Undue Influence How it Has Applied in The Music Industry..... | 61 |
| 5:1 | The Fleetwood Mac Case | 62 |
| 5:2 | Gilbert O'Sullivan..... | 64 |
| 5:3 | Evaluating Undue Influence as a Governance Factor to the Industry - The Inclusion of the Principle of Inequality of Bargaining Power and the Cross-over With the Common Law Doctrine of Restraint of Trade | 67 |
| 5:4 | The Stone Roses Case | 70 |

DEVELOPMENTS via RESTRAINT OF TRADE

| | | |
|-------|--|----|
| 6: | The Initiation of The Application of the Doctrine of Restraint of Trade, Leading up to <i>A Schroeder Music Publishing Co. Ltd. v Macaulay</i> [1974]..... | 73 |
| 6:1 | A Closer Look at <i>A Schroeder Music Publishing Co. Ltd. v Macaulay</i> | 79 |
| 6:1:1 | Lord Reid..... | 79 |
| 6:1:2 | Lord Diplock..... | 82 |
| 6:2 | The Standard Form: Clauses From The Schroeder Contract..... | 83 |
| 6:3 | The Paradox of Duration | 85 |

COMMENT

| | | |
|----|--|----|
| 7: | Abusing a Doctrine Will Cause Further Lack of Clarity in the Law | 88 |
|----|--|----|

COMMENT

| | | |
|----|---|----|
| 8: | Why Has this Area of Contract Remained in the Domain of Common Law: Why Not Statutory Intervention? | 91 |
|----|---|----|

ACADEMIC APPROACHES

9: The Concept of Co-operation 96

9:1 Co-operation Intra-Contract or Mere Economic Self Interest and Utility
Maximisation: The point of View of Roger Brownsword 96

9:2 The View of Hugh Collins..... 98

9:3 The view of Morten Hviid 100

RESEARCH into THOSE WHO MAKE UP the [POP] MUSIC INDUSTRY

10: The Nature and Characteristics of Those Who Constitute the Music Industry 104

10:1 The Businessmen 105

10:2 Development in the Industry - Will it Change the Characters Who Forge the
Relationships?..... 109

11: The Artists 114

11:1 A Propensity toward Lifestyle Shifts is an Artist’s Character Trait Which Can be
Damaging to Long-term Relationships..... 115

11:2 Destructiveness 117

12: A Paradigm of The Artist – Built From Survey Responses and Interviews
Combined With Information From Relevant Case Reports..... 120

12:1 Questionnaire Analysis Results 121

COMMENT

13: The Potential Impact if Law Continues to Evade the Industry Mind Set 127

PART TWO

TESTING THE HYPOTHESIS

TESTING AGAINST the GEORGE MICHAEL CASE

| | | |
|------|---|-----|
| 14: | The Principle and Operation of the Hypothetical Doctrine of Unconscionably Constructed Contracts | 130 |
| 14:1 | George Michael, Personal Characteristics and Career Building..... | 130 |
| 14:2 | Events Leading To Panayiotou v Sony [1994] | 132 |
| 14:3 | The Onlooker's View of the Case From Sony's Perspective | 134 |
| 14:4 | Panayioutou and Others v Sony Music Entertainment (UK) Ltd. | 137 |
| 14:5 | Testing the Hypothetical Doctrine | 139 |
| 14:6 | Summary of Findings in Respect of Whether there was an Unconscionably Constructed Contract:..... | 154 |

ARGUMENTS RELIED UPON

| | | |
|------|--|-----|
| 15: | Arguments Which Support the Proposed Approach | 159 |
| 15:1 | Inequality of Bargaining Power | 159 |
| 15:2 | Good Faith | 164 |
| 15:3 | Public Policy | 165 |
| 15:4 | Economics Considerations..... | 166 |
| 15:5 | Academic Suggestions | 168 |
| 15:6 | Behavioural Traits..... | 170 |
| 16: | What Has Been Rejected in Formulating the Hypothesis | 173 |

THE MOST RECENT EVENT

| | | |
|-----|--|-----|
| 17: | Nicholl and Another v Ryder (1998) | 179 |
|-----|--|-----|

Introduction: The Hypothesis

The hypothesis here is that English Common Law contract law would be improved by the substantive development of a new operational principle. For the purposes of this discourse the suggested principle has been called the Doctrine of *Unconscionably Constructed Contracts*. To support the argument, the music industry has been identified as representative of a class of contracting parties that may benefit from the application of such a principle. In legal terms there appear to be three prevalent doctrines at play through music industry disputes which are relevant to the discussion to be had here. These doctrines are *restraint of trade*, *undue influence* and the question of whether or not any defensive plea of *proprietary estoppel* (or *waiver* or *laches*; it seems unclear as to the appropriate term¹) is properly available.

To test the argument that a new approach at law would be advantageous, case history drawn directly from the music industry as well as surrounding influential cases will be analysed. Alongside this case law, specialist and general commentary from academic text and relevant reports such as trade journals and newspapers will be discussed. This discussion will raise evidence for the suggestion that the music industry grasps only disparate elements of the above mentioned, currently operable doctrines and principles of contract law. This is shown in the manner in which these have been raised *arguendo* through litigation and, over time, have become mis-utilised by those in the music industry in pre-trial circumstances. Academic and general responses to these litigious events add a dimension of influential analysis which is constructive toward offering a structure for alternative or additional new law. The most recent culmination of this area of inquiry is provided via the judgement of Thorpe L.J. in *Ryder v Nicholl and Another*,² given in the Court of Appeal on 15th December 1999. That case has provided a timely insight to current judicial responses to those questions and debates in which this discourse is footed. Furthermore, a substantial degree of the closing argument here has been built around that case in its capacity as provider of up to date comparators and tests for the hypothetical doctrine.

In addition to argument footed in traditional legal studies it has been found to be important in this discussion to examine the behavioural characteristics of contracting

parties from the music industry. It is believed that a specific understanding of the mindset of the industry is a necessary corollary to any serious attempt at suggesting how and why communication with it can be improved. The motivation behind the hypothesis here is that contract law is, or should be, a tool of behavioural governance and it is understood that this is a conceptual tool which can operate only through controlled and efficient communication.

Having accepted that contractual disputes and contract law are very much a topic of human behaviour, a significant proportion of the test for the hypothetical doctrine of Unconscionably Constructed Contracts is focused on the discovered characteristics and nature of parties in the music industry. To furnish this discussion a variation of the Briggs-Myers Type Indicator³ test has been used to build a survey questionnaire. The test was circulated to 25 up and coming, creative artists⁴ (musicians, soloists and lyricists), of those 16 completed the questions. In addition personal experience gathered during some ten years working in that industry has been combined with interviews and discussions with

professionals drawn from UK based recording and publishing company offices and conducted during the period taken for this research. Further character studies have been drawn from biographical material, music industry books and commentaries, all of which have been recommended from within the industry.

The core debate, which runs through the majority of academic discussions surrounding both the validity of a stand alone doctrine of unconscionability and the nature of music industry cases at law, frequently highlights considerations of the balance of economics influences in these areas. Thus it has been found necessary to observe here the influence of gains maximisation, whether that be idealistic or pecuniary. This observation must be levelled at those parties entering in to contractual relationships as well as those already in dispute. All of the relationships subject to this discussion are, of necessity, long-term relationships. This fact is considered to be pertinent to the context of relevant economics based issues and the placing of those issues within this discourse.

Observation suggests that while relevant parties, commentators and law makers (advisors, advocates and judiciary) remain to some degree conscious of economics influences on contractual behaviour in this field, less clarity of awareness is evident over the power or potential power of [common law] contract law itself as an industry-wide governance factor. Therefore, some emphasis has been afforded to the possibilities for lawmakers to utilise a new approach such as the hypothetical doctrine of unconscionably constructed contracts, as a tool with which improved behaviour patterns might be engineered. The scope for improvement ranges from pre-formation negotiation through to planning and maintaining the long-term, contractually based relationships. This incorporates expectations management from the moment of first meeting or speaking and, of course, expectations management at those times of relational breakdown irrespective of whether that breakdown leads, or is likely to lead to litigation. Furthermore, such an approach at law to the relationship should encourage a greater understanding between the judiciary and the contracting community. It is anticipated that this approach would render clarity to the judicial delivery of guidance and remedy. This in turn would enable confident shifts in contractual based relationship behaviour.

In order that the concept of the hypothetical doctrine be tested as rigorously as possible, factors from throughout the following discussion and research have been pulled together to draw up a suggested draft for that doctrine. This consists of general advisory notes targeted at defining the scope and intention of the doctrine. At the conclusion of this discourse, framed by the scope and definitions given at 2 below, and guided by the relevant case law, academic discussion and empirical research which follows, applicable tests and questions are offered. These, it is felt, could be raised in practice towards the purpose of settling such disputes as the doctrine intends to address. Refinement beyond the broad discussion on estoppel/waiver, like specific *quantum meruit* where *restitutio ab initio* is not possible and other case-specific technicalities are not considered part of this discussion. It is felt that these decisions remain within the domain of courtroom response to facts and circumstances.

1: General Comments About Standard Form Contracts and Consideration of Their Place in Music Industry Contractual Relationships

An overview of Standard Form Contracts raises a number of questions. In essence they exist as a tool of convenience but they are often considered oppressive either by intention or unintentionally by virtue of their construction. It can be stated at an early point that the belief here is that music industry standard form contracts are not malicious documents intended to mask onerous terms and/or deceitful clauses. They are merely standardised tools, designed and developed out of a need for expedience and economy. That is not to say that there have not been those who have set out to tip the balance of benefit in the favour of their employer, or, in some cases their own business interests, be they invested in recording or publishing houses. Overall, however, it is not those instances which have attracted the attention of this study. In contemporary practice there is some form of review of the contract in most cases and some opportunity for an artist or writer to allow his advisor (generally a solicitor) to suggest amendments.⁵ Having said that, the basic standardised form will be generated by the record/management/publishing company and negotiations will be thus limited. Also, following *A Schroeder Music Publishing Ltd. v Macaulay*⁶ it can be taken that the judiciary consider music industry contracts as 'standard form' and apply the law accordingly. Over and above the origin of the documentation, what has been brought to focus here is the relationship, contractual relationship that is, for which the paper contract in this industry has apparently become the copingstone. Thus, this discourse will attempt to move beyond a narrow analysis of published contractual terms and conditions in order to inspect the interaction between parties to the contract and between those parties and contract law. It is felt here that the nature of this approach to analysing this class of contract has been structured not so much by design as by the forces of the nature of the subjects under study. Even though the discussion must necessarily visit debate and views offered through academic and court room opinion, it seems that the nature and characteristics of both creative and corporate parties to music industry business relationships, prevent either themselves or the onlooker from restricting their attention to a singular focus on 'rules of law'.

For example, in building or engineering industries⁷ it would appear that standard form contracts forge a literal link between parties who enter into long term business relationships and who intend to advise, supply or carry out some physical activity for each other in the interests of maintaining their ongoing livelihood. In these industries, the concept of acceptable waiver (over delivery conditions or similar contractual terms) to give effect to the spot intentions of the parties in their long-term relationships is not uncommon. However, this has not developed as acceptable standard practice to bring flexibility in music industry cases.⁸ The standard form contract in the music industry has a substantially different role than mere evidence of a flexible working agreement. Its position within the relationships under discussion here might lead one to believe that 'the contract', in some popularly mythicised guise, sits in its prepared state on the record company or publisher's shelf, waiting to be handed down to the eager artist like a dose of efficacious, sugared tonic. It can be conjectured that when a builder gets a contract to build, he is delighted to have his immediate future mapped out and can set about planning the business of carrying out the building work, ordering the necessary labour and organising the ensuing income. When a creative artists *gets* a contract with a recording or publishing company, observation suggests that his mind stops short of the future and dwells on the triumph in the instant victory of attaining what is in his hand. Future creativity, future productivity and business management are not key concerns of the creative party at this juncture. He appears to assume that the future will take care of itself as a direct result of this paper document to which he is now a party. This statement may be something of a broad generalisation, but evidence here supports that it is only when the relationship reaches some aspect of personal or behavioural frustration that the formation of the contractual document will be addressed. This tends to be acted out in a vitriolic manner, the artists generally expressing a vehement wish for severance rather than flexibility. This comment, it is felt, is supported by all or any of the music industry cases cited below.⁹

In exploring why music industry contractual relationships demand studies and solutions which go beyond the confines of mere contract law, as it now stands, it has become evident that there is a substantial weakness in this business based activity. This is that the parties pay little attention to the gaining of a general understanding of the depths,

drives and philosophies of contract law itself. This comment is made inspite of the fact that in the history of the music industry, its leading corporations have often been headed up and populated by qualified or part-qualified lawyers. By comparison it appears that while the building industry example suggests avoidance of strict application of the rules of contract law, there is surely an inherent understanding of common law ethos and contract law in general in the choices of variation and waiver. By comparison, and as will be discussed at length later, both the George Michael¹⁰ party and the Shaun Ryder¹¹ party gravely underestimated the strength of their argument footed in *restraint of trade* given that in both cases it was found that variation and waiver worked against them and were the very principles which put victory at the feet of the other side.

Through their strong, often volatile personalities, music industry 'figure heads' tend to dominate therefore personify the corporations which they represent.¹² They do not, however, make a practice of deep philosophical study in the same way as, say, the judiciary might. The tendency is rather more toward business law, copyright or commercial law, (generally these areas tend to be based in legislation rather more than cultivated from judge-made or Common-law¹³). Their *forte* will be to demonstrate sharp litigious wit and an understanding of the type of legalese employed in drafting businesses and business contracts. Amongst this class who are so often dancing a commercial Texan waltz (one step forward, two steps backwards) in their contractually bound relationship building, surprisingly little effort is made toward taking control of what effects might be imposed by common law contract. Neither party takes control of the spectrum of behavioural effects contract law intends to introduce, let alone control of the delivery of their own genuine *intentions*, in order to bring to bear success in their ongoing business. At the outset of such a relationship, there is no evidence that either party shows direct concern that the industry-standard contract clauses which they employ regularly fail to represent industry standard expectations on one part or the other. Clarity in the formation of the relationship is not achieved by the issuing of industry standardised contracts, although that is, in many respects the standard form purpose.

Artists and composers, it would seem, are as notorious in the 1990s for their apparent business naivety as they were in the 1950s and 1960s. At least it could have been argued, some forty years ago that there was comparatively little industry custom or experience, in the rock and pop field, upon which to base their expectations. As will be discussed throughout this text, this class of individuals has, however, developed the habit of progressing the relationship for some time and then attempting to bolt from their contractual obligations. Generally this tends to coincide with bursts of significant self-awareness, triggered by spurts of career enhancing developmental shifts.¹⁴ This, in turn, triggers a drive to force radical change within the microenvironment in which the individual functions. For both sound as well as selfish motives, allegations of restraint of trade¹⁵ will be levelled against the standard form contract. The purpose behind such an allegation will be to either (a) force the other party to the relationship to concede to unplanned alterations in the ongoing business progress; or (b) to attempt to force the other party to release the individual from that contract. It seems that the standard form contract, which at once crystallises the creative party's desires and ambitions, will later be perceived as nothing more than a fettering agent.

Corporate industry parties on the other hand, have honed and refined portions of their contracts in reaction to changes in trade practices, or as a veritable knee-jerk response to high profile cases. However, it is felt here that these changes have been minimal, tending to focus on financial reward rather than long-term relationship nurturing. Proposals which embrace the real costs and losses bound in bad relationship management are only to be found in specialist academic comment and, as with in-depth judicial commentary, the majority of this falls on stony ground when it comes to seeding behavioural reform. The irony of this is that it is a successful, long-term relationship that both parties must intend and desire from the outset. This is what the standardised contractual documents are set out to achieve, because this is the structure on which the whole economic philosophy of this industry is founded. A continuous string of one off exchanges would not enable the huge profits or high profile market positioning which the long-term relationships in this industry allow to accrue.

In analysing standard form contracting as a behavioural tenet, it is possible to say that there are two schools of approach. There are those who believe that these standardised, company authored contracts represent lengthy and deliberate attempts to entrap an artist, lyricist or composer (*the creative party*) into a relationship which is heavily biased, apropos of benefits to be gained from the ensuing commercial activity, in favour of that company. This achievement of gains would be the result of the accumulation of many lengthy and complex clauses that would baffle the expectations of the naïve. But, these clauses have been tested and revised over a period of some one hundred years (initially through music hall and variety entertainment contracts). So if it were true that creative parties continue to arrive at the contract in such a naïve and ill equipped state that they have never influenced the terms of their agreements then this discourse will set out to ascertain why. This question must surely extend to ask why contract law has not, through ratio and deliberation, provided the naïve with the tools required to strengthen his propositions for a successful future.

If there is a failure in the reach of the law here, there are those¹⁶ who would suggest that it is as a direct result of a purposive philosophy of *laissez faire*. This view legitimately harps back to the origins of some modern-day principles at law and the surrounding political policies of the 18th and 19th centuries. It can be argued that this perspective on the nature of music industry standard form contracts, along with views on the industry's propensity for alleging restraint or restriction of trade, is the most common approach. This approach, and the discussive points so raised, is supported by evidence which tracks the evolution of the legal principle of inequality of bargaining power in this field. This subject will be analysed in detail through the following pages.

On the other hand there are those who suspect that the same standardised documents are merely overly complex and potentially noxious as a result of bad husbandry. This suspicious approach to observed legal complexity could be partially explained by the realisation that, over time, linguistic legalese has become unintelligible to the layman. This is not because the layman cannot read, or cannot read adequately, as may have been the case for the general populous in centuries gone by, but because the twentieth century layman literally speaks and reads an equally complex but quite different modern

language. The fact is that to replace antiquated (albeit thoroughly interpreted) legal phraseology with modern terminology is proven, necessarily, to require equally lengthy and detailed passages. In many industries the current drive toward 'plain English' in the development of all documentation might prove disturbing to practitioners and students of law alike. Instances will inevitably arise where this fashion for word-economy will cause draftsmen to neglect the precision with which legally binding matters must be conveyed if they are to have any enforceable effect. If such attention to detail were to be neglected for the sake of economy or linguistic simplicity then the 'contract' may carry unintended gaps or may be subjected to unanticipated misinterpretation. Thus it is believed here that wordy music industry contracts should retain their bulk and that there is some value in the reticence with which standardised contracts become subject to change. In the same context, however, one method for building changes in to standardised contracts has been observed during this research with some alarm.¹⁷ During interviews carried out for this discourse the habit of drawing paragraphs to build contracts from printed or electronic database sources has been witnessed. This practice results in the patching together of paragraphs and phrases for the sake of expedience, and seems prevalent in entertainment based businesses when building contracts for services between parties neither of whom (in the main) understand the actual or specific meanings of their texts. It has been observed here that this type of standard form writing leaves the central corporate party and each of the individual creative parties with unique and often contradictory beliefs over the meaning of certain clauses within their document. Therefore, it could be argued, in simple contract law terms that there is no contract between these parties because there is no real agreement, no *consensus ad idem*. It certainly makes contractual dispute, in the event of disagreement during the relationship very complex and costly when a) clauses may, in fact, be meaningless; and/or b) whether the clause(s) are meaningless or not, each party has a different interpretation of what they believe the clause set out to mean. This observation only applies to what might be described as the fringes of the entertainment industry where the companies involved are low budget or inexperienced, substantial and long practising parties are, naturally, better advised and better equipped. But the philosophy in some quarters that contracts, especially standard form contracts, are documents which the majority will not understand anyway seems to fuel the continuing failure to try to

understand as well as negating expectations that any non-specialist could understand what is written. What this shows is that this approach to the study and analysis of standardised contracts is not contradictory to the *lessaize faire* approach given above, but should be considered as equally valuable and additional to the study as undertaken here.

By broadening the perspective of this analysis, and in contrast to the pessimistic views portrayed above, it is possible to argue that a standardised paper contract which has been revised through the last forty to fifty years by a company such as CBS, RCA or Warner Brothers makes perfect economic sense for both parties at the outset of what is *intended* by both to become a long and satisfying relationship. What will be assumed from here onward is that it is the relationship in total, not merely the tangible evidence of the birth of the relationship which must be analysed if genuine industry problems are to be identified and addressed. With this principle in mind, common sense would suggest that that years of experience and consequent revision should have encouraged documented clauses which engender relational co-operation. However, it is believed here that this common sense ideal may be isolated as the juncture at which there is prevalent failure in good quality contract making in this industry. Observation, as discussed post, suggests that such an ideal symbiosis of the commercial and the personal factions has not been attained, either within the paper contract (whether standardised or not) or within the relationship which it serves to bind. There is a paradox in that the commercial entity, say a record company, will have its focus fixed on maintaining a market place success continuum which precludes the agreement from allowing indulgence in experimental output from successful, high turnover artists. At the same time, an individual record company executive ¹⁸ is likely, by virtue of his mode of livelihood, to have a deep personal understanding of the forces which change an artist's drives and feelings toward what is important in terms of experimenting with musical style, lifestyle, political style and so on. For the majority of the time the executive and the artist will carry the relationship unimpeded by the formalities of the company or its standardised contract. But this is virtually a three party contract, Company, Executive and creative Artist each having a distinct and personalised input. When any two of the parties come into dispute about performance of contractual obligations or indeed

performance of relational duties then the relationship itself will tend to swing from one of personalised support, friendship and advice to one of self-only benefit maximisation, market place positioning and, frankly, profit potential. In these instances,¹⁹ even if the artist is the party who is behaving badly in contractual terms, his adversary represents an unusually dichotomous opponent. This in itself encourages argument, even at law, to take on deeply personal opinions which are unusual in commerce based law considerations. Standardised contracts cannot be said to be responsible for the three way relationship so described, but at present none of the standard issue in use address the inherent problems of such relationships to any satisfactory extent, and neither, it is felt here, does the law itself.

So, to clarify the hypothesis on which this work is based, and to identify the beliefs underlying the commentary surrounding research findings for this discourse it must be said that long-term relational contracts, on which the music industry is founded, go beyond transactions intended to achieve mere capital gain. Albeit that the legal context of this breadth of contractual scope remains un-preplanned and unintentional on the part of the draftsmen or their employers.

It is speculated here that if the subject matter was merely simple transaction or series of transactions exchanging talent for money (via selfish and/or unnecessarily complicated written terms) then there would be considerably fewer contractual problems arising, and certainly almost none of those to be discussed post.

Furthermore, whereas studies such as that of David Yates²⁰ suggest that the operation of standard form contracts causes the *individuality* of the parties to become irrelevant, it is contended here that such sensitive long-term contract based relationships as will be found in the music and entertainment industries actually incorporate *individuality*. Therefore these contracts, and contract law should have developed sufficient scope to address what is incorporated, in total, inclusive of personal expectations as well as what ever other matter constitutes *individuality*. It is surely not possible, given the expectations and intentions of music industry contracts, for the individuality of either the industry executive or of the creative party to become irrelevant. Yates' comment

seems particular only to the consideration of consumer contracting, as do the majority of comments and discussions centred on standard form contract problems. In response: firstly, there is rarely the formation of any long term relationship of such dependence between consumer and retailer and/or consumer and manufacturer as there is in contracts binding entertainment industry relationships; Secondly that discussion in general focuses heavily on the tendency to include *exclusion clauses* within consumer based standard forms. Commentaries like Yates' might, therefore, be set aside from the discourse in hand. However, attention must later be paid to the effects of the Unfair Contract Terms Act, 1977, and the operation of section 3(2) in relation to the long term, contract based, business relationships. This portion of the discussion will also explore whether, if UCTA is applicable, later European legislation is capable of intervention in future cases of the nature under study here. Returning to the point initiated here, individuality (character) is key to the package for which the bargain is struck in music industry contracts.

It is felt here that the paper contract represents approximately one third of the substance of the legally binding relationship. The other two parts being the long-term personal relationship between the creative party and the industry representative with whom he most regularly deals, and the long-term commercial expectations of the two. It might be protested that the paper documentation cannot be intrinsic to the contract because it is merely the carrier of the contract in written form, but what is to be revealed is that the concept of the contract in this area has evolved so that the thing itself and the *getting* of that thing have become materially significant. The parties do not initiate their relationship by stating what commercial activities they promise to carry out, but by saying here is material evidence of a 'contract' with RCA/CBS/Sony/Accuf Rose [etc.], we agree to allow you the creative artist, to have, hold, own and sign this contract; then: we agree that you the creative artist have a relationship with us; then, because we have gifted you with our [paper]contract and entered into an agreement to carry on a relationship with you there will be commercial activity to which we can all appoint expectations. Here is the evidence that you, the creative artist, are now a fully signed up participant in 'show-business'.

This document enables that creative artist to describe “my record company. . .” or “my publisher . . .” or “my manager. . .”. The rock and pop mega-star are icons of the 20th and now the 21st century and these contracts and the relationships surrounding them exist in an ethos of licenses to become legendary, at least within a given market if not on an international scale in all cases. That is the expectation which the creative party brings to the deal. These emotive and unwritten additions to the contract are a substantial part of what this work sets out to measure and evaluate. The same may be true in a few other industries such as the literary and artistic publishing industry perhaps, but in the main it is not the subject of discussion or conjecture in works about contract law. This is perceived here as a shortfall in works elaborating on contract law for academic enlargement of the subject. Socially this may underpin a gross oversight in the development of the operation of this area of law and legal regard for relationships in the name of public policy.

1:2 The Music Industry Contract, Comments on Its Development and Content

In creating an overview of the development of music industry contracts it is interesting, at this stage, to reflect on a piece of anecdotal evidence of early use of standardised contracting. The subject is not specifically musical, but can be seen to represent one of the early exercises in creating and marketing popular records.

The story is part of the life story of Pantomime comedian Sandy Powell:²¹

During a visit to his agent, Walter Bentley, in 1929, Sandy Powell overheard that a recording arrangement had been finalised between some American singers and Vocalion Gramophone Company, London. Powell complained that the agent didn't make such arrangements for English acts. The next day, Bentley told Powell that he had arranged for him to go and record at Vocalion with Recording Chief, Bill Hanson. As stated above this was not a recording of music, Powell chose to record a popular stage sketch called *The Lost Policeman*. The company's selection board accepted the recording and it was decided that the record, an eight inch, 78 rpm with a duration of ten minutes, would be released on the *Broadcast* label at a price of One Shilling. Powell was offered a choice of contract, he could either take a one-off payment of £60 on release and have

no further rights in the record, or he could take a payment of £30 as the recording session fee and retain the rights to royalties for each copy sold. He chose the latter. *The Lost Policeman* sold over half a million units and during the next few years a total of seventy-nine recordings, released on *Rex*, *Broadcast*, *Imperial*, and *Victory* labels, sold some seven million units. Royalties from these records earned upward of £12,000 per year.

That Sandy Powell story serves to make a distinction between lengthy, and often restrictive Artist Contracts such as those which were developing in Hollywood during that era,²² and the almost informal attitude toward the agreement between a recording company and an artist during this time of music industry development. Unfortunately the informal and uninformed attitude of many would-be performers and writers in the early part of this century did lead to many instances of mischievous advantage being taken by sharp recording companies. For example *The Manhattan Brothers*,²³ have stated that they were taken in to recording studios and recorded but then told that “Blacks were not entitled to royalties”. Undoubtedly, during this development period there are many cases of genuine misrepresentation, undue influence or just plain unequal bargains entered in to by those naïve would-be singers. It was not uncommon to sign single sheet agreements to record songs for \$5 or \$10.²⁴ Artists’, lyricists’ and composers’ representation, along with industry executives themselves, can be presumed to have become more sophisticated through experience and education during the past fifty years. Alongside this, the development of high-speed communications, long distance travel and recording and broadcasting technology have all been instrumental in the enforced refinement and complex additions to the industry and its standardised contracts. The simple exchange of work for a flat fee plus royalties is still the essence of music industry contracts but now there has to be protection against reproduction and passing off. Consideration must be had for the performance of a composer’s material other than the original performance, overseas sales must be accounted for, and so-on. Beyond this, it might now be accurate to state that the industry-produced contract is the materialisation of the creative individual’s dreams. It sates his ego and puts into his hands tangible proof of his new relationship with industry kudos. As a potential

governance factor for this type of industry, contract law must continually find methods for broadening the scope of its reach.

In order to understand the more transient relational issues of long term contractual relationships it is, of course, necessary to understand the less flexible and standardised terms against which those relationships rest. Starting first of all with the bare facts and quantifiable measures of the contracts under question: An artist or writer/composer can expect to find written into a publishing contract for example: Definition of territories where the publisher has rights to market and profit from the composition; clauses which define the writer/composer's rights to say 10% of the cover price for all sheet music sales; 50% of all record royalties from U.K, which the record company will pay to the publisher, being some 6.25% of the retail, price less V.A.T.; on joining PRS (the Performing Rights Society) some 50% of all performance fee royalties (otherwise paid to and claimable from the publisher if the writer is not a member of PRS), this includes obligatory fees payable by radio companies, TV broadcasters, and venues for live performances. The writer/composer should also get some 50% of any other income, which the publisher gets from his work, and there will need to be clauses and definitions covering this. Additionally there may be 25% of overseas and/or sub-publishing, overseas record royalties; then there will need to be definitions for duration of the contract, options to renew and determination arrangements. As can be imagined, an aspiration toward a dream life-style and the achievement of success in creative, artistic terms is hard to reconcile with the type of wording and calculation, which such a document must carry when expressing percentages and percentages of percentages *per se*.

Similarly a record company contract must cover territories within which the company may market the product, royalties to publishers for compositions, artists' royalties, producers' royalties, retailers' margins, recoupment of the cost of pressing and marketing to the record company the record company's own percentage, V.A.T., copyright license fees, label and cover costs, duration, options to renew and determination arrangements. New additions introduced to these contracts, in respect for the rapid changes in playback technology over the last twenty years include wide

clauses intended to cover potential release of material through some new medium such as the Internet, and mediums which have not yet been invented. These contracts will also contain notes about the style of music and characteristics of artistic presentation expected. This is because the company will have expertise in specialist markets and must be enabled to capitalise on this by being supplied with suitable product. There will be notes about the frequency or volume of production of new material so that the company can make commercial timetables, plans and arrangements. There may also be notes about what degree of tour support and involvement, merchandising support (T-shirts and logo/identity bearing product) and other non-direct activity involvement the company wishes to undertake.

A manager's contract will seek to set out what percentages of what percentages the manager expects to retain from the artist or writer's various sources of income, the extent to which the manager will invest in gaining the artist's position in the industry and what he will undertake in order to look after the artist's interests within the various activities which must be acted out in order to achieve exposure, credibility and success.

Add to the above the growing complexity of conditions which have become obligatory and integral to the text of a music industry contract like the need for longevity in the relationship if commercial success is to be achieved. In Sandy Powell's day high profile marketing for such recordings did not really exist and certainly did not represent the hundreds of thousands of pounds which a company will nowadays invest (some would say gamble) on creating and maintaining the market desire for an artist. Returns against such high investment necessitate the obligation of longevity in these contractual relationships. Theoretically both parties have opportunities to negotiate the contract to their satisfaction (*musician* is not a synonym for incapacitous idiot) which returns the discussion, here, to the early conclusion that the standardisation element of music industry contracts is, in the main, a tool of economy and expedience.

On the matter of these contracts in general, (notwithstanding extra-contractual relational issues) the corporate party will set out to gain a long-term commitment of exclusivity. As part of its fiduciary duty it is best advised to ensure that: a) the artists' or writers'

lawyer, or some other qualified third party, explains the connotations of this exclusivity, especially where the artist or writer is young or inexperienced; and b) that there is no currently live contract or terms of any contract which binds an interest in the work of this artist or writer to some prior relationship. In this industry post-contractual triggers operate similarly to covenants of restraint of trade (reasonable or otherwise) in employment contracts. There is evidence, following litigious disputes such as those to be discussed in the following chapters, that artists and writers have come to believe that a combination of options to renew and post-contract clauses are utilised inequitably by music industry companies. That is to say that artists and writers who wish to bolt or rapidly escape their obligations from the contractual relationship, which generally occurs for personal or personality based reasons, will brandish accusations of restraint of trade.²⁵ The most recent development in this area, however, is the judgement in *Nicholls and Another v Ryder*²⁶ where it was given that an artiste would be estopped from alleging the contract invalid (by reason of being in unreasonable restraint or trade). The artist or writer would be considered to have waived this legal right if he had, for any substantial length of time, carried on performing his obligations under that contract and/or had caused the other party to alter their position in reliance on that contract, with or without detriment to that party. This may be a controversial decision by Thorpe LJ and will be discussed as appropriate, in some detail through this discourse.

A point that may be distinguished here is that the contracts under discussion here are never contracts *of* service or employment, they are contracts *for* [personal] services. Although artists and writers are bound to their record and publishing companies for periods spanning years the company does not, in the eyes of the law, have total control over how, when or where the creative party goes about creating his wares. The company can stipulate acceptable quality and, to some degree,²⁷ style for the creative party's output as well as delivery requirements. It can also reject material or keep it on hold once it has been delivered. Indeed, the artist or writer might use facilities provided by the company, but these are provided on a hire basis and are paid for out of royalties and earnings by the artist or writer, this would indicate shared risk in the costs and efforts of the venture. No responsibility is held for working hours or conditions. This means that artists and writers fall outside the protection offered by employment law.

For example, an individual artist is a self-employed service provider, or a group might be a partnership or business in its own right, termination of the contract could never lead to a case for *unfair dismissal*. Fees are not regulated or protected as a legislated right by minimum wage stipulations, although the Musicians Union has set minimum standard hourly fees but enforcement depends on whether the artist has membership of the union and on some degree of co-operation between the artists and the union. Liquidation or bankruptcy on the part of one of the parties could never lead to any *redundancy* rights on the part of the other. Similarly there are no enforceable statutory obligations within this type of relationship as to health and safety at work, minimum number of working hours per week, paid holidays, entitlements during sickness and so on. All of these aspects fall within the responsibility of each service provider and he must ensure that he has adequate insurances or that the places he visits to provide the promised services have public liability or indemnity policies which protect all involved to at least the minimum acceptable level. Furthermore, between shows or performances an artist will have difficulty in claiming unemployment benefits because these periods are part of his business pattern and are not periods of unemployment per se unless he has left his music industry career, and that would be self inflicted.

The reason why these relationships are formulated in this way is because each party may seek to contract with several others for the purposes of operating the artists' and writers' careers. For example if each artist set himself up as a business and 'employed' a manager, a producer, recording experts, technical experts and marketing experts and so-on, then each manager/producer/recorder would be bound to one creative source. Marketing would become impossible and profits would be too thinly spread to benefit any one to the degree that they do in reality. That is not to say that a different business set up cannot work for a few 'mega stars' who generate such great income that it makes sense for management and even publishing and recording to be in the ownership or employ of the artist.

On the other hand, exactly why major record companies do not 'employ' artists, putting into place specialist marketing and technical crew remains unclear. Presumably this is, initially, a matter of tradition. The crux seems to be an element of mis-trust between the

parties over the matter of the fair distribution of income. Productivity incentives and sale related bonus schemes augur against the creative nature of the individual and will not produce an environment in which he is content and productive.

Having added some substance to the understanding of the subject matter here, there are two points to be reiterated in order that they be kept in mind:

1) that the term 'standard form', as it is to be understood in context, with reference to music industry contracts, implies standard terms and conditions settled by each record/publishing/management/agency or producer's company which has had the form drawn up. These contractual documents are not standard across the industry, although they will naturally be similar. Furthermore each contains flexible negotiable clauses on the matter of percentages, royalties and advances. These degrees of remuneration seem to both parties to be the focal point of negotiating leverage once it has been decided that the artist or writer is capable of creating works that suit the company's marketing strategies.

2) The second point is that it is ownership in the paper item itself and the application of the signature to the contract which is, in the minds of the artists, lyricist or composer, the manifestation of success. The 'thing' which they aspire to gain seems initially to be the signed paper form. The ensuing relationship is taken for granted in that it is expected to flow, by both parties it seems, as if by magic from the signature to an idyllic future of creative satisfaction. However, the relationship, the intensity of mutual respect and the areas which will beg compromise, sensitive and personal issues of character development and personality shifts²⁸ are not, of course, addressed by the document at all. Nor, indeed, are these issues able to be addressed within the current field of contract law. In legal terms *good faith*, mutual trust and confidence, even fiduciary duties are restricted to considerations of the technical and quantifiable aspects of the contractual relationship. Expectations, in the eyes of the law, can be measured in terms of how many recordings or appearances or publications one party is expected to perform within a given contractual period. Judicial analysis can only take account of contractual restrictions on the utilisation of skills for the purpose of earning a living.²⁹ Judicial measures of undue influence have, in the past,³⁰ rarely stopped to calculate the self-

deception of the eager artist or the ill informed intervention of enthusiastic parents, wives or friends in their bid to attain that signed contract.

1:3 Music Industry Contractual Relationships, Comments on Sources of, and Approaches to Problems

Each artist, lyricist or composer comes to each contract in his capacity as an industrial unit, trading the successive manufacture of unique items (songs or performances) against a percentage of the income that each specialist company can generate through expert handling and exploitation. Conversely, once one of these companies obtains an interest in the created work it transposes this one-off piece of art, via the process of multiple copying, into a commodity of potentially limitless market duration. The relationship between the creator of the work and the work itself occurs at two levels then. Initially it is for the act of fresh creation that the artist or writer is expecting to be rewarded. At this stage he faces (sometimes daily) the ego bruising experience of rejection or criticism and the possibility that this unit of creativity will be rejected or put on hold. Once the unit has been accepted and reproduction commences then live performances will carry on like a supply of hand baked cakes, each time one is purchased and consumed another, equally as good, must be baked and offered up to the market. A new baker will make a new interpretation of the recipe just the same as another singer, or even the same singer when he appears at different venues, will make a new interpretation of a song. Hopefully, although each will be different it will be just as good so that the market desire is maintained. Similarly, hard copies of the material may amount to one release running into thousands or even hundreds of thousands of sales, sometimes millions world-wide. However, a successful song will run to many releases by many artists and will have the option to return to the market as a re-release or as an item on a compilation album. All of these points of sale along with radio and TV play and nowadays internet exposure will represent a percentage royalty to the original writer and the artists involved. It is the responsibility of record, publishing and management companies to ensure that the royalties represent fair remuneration to the creative individuals. Because of the nature of the contractual relationship in this industry the corporate parties are ultimately only ever advisors to the creative parties. Good, expert

advice will lead to a good career, but there are some areas, as will be seen, where advice is sparse and there is room for improvement. Because the industry is well developed and has already formulated characteristic habits of operation it is in need of guidance and governance in extending the scope of its intra-advisory behaviour. Some of this guidance should become mandatory to business behaviour if the future is to bring improvement.

Having realised their purpose in acquiring the expertise of industry executives, artists lyricists and composers frequently, deliberately avoid involvement in marketing based decision-making and favour channelling their energies purely into creative work. This encourages the corporate party to become the steering element of the business and marketing development practices in hand. As will be seen in later discussion, this factor of the relationship can be misconstrued if a dispute arises and is brought before the court. The fact of the industry's common use of standard form contracts, in conjunction with the incorporation of terms of fidelity has engendered within judicial approaches a tendency to perceive a relationship based on *inequality of bargaining power*. This perception can easily give rise to the conclusion that the contract unduly restricts a creative individual's options for marketing his output.³¹ Given this perceived relational imbalance along with the standard form embodiment of the Agreement, if the relationship does come to dispute before the court then any term which is biased in favour of the corporate party may potentially be construed as usurious, onerous and generally passed on to the creative party by means of undue influence. The court perceives the solution to this to be the appointment of independent advisors at the outset of the relationship, guiding the creative party toward his best interests. Of course it would be quite wrong to suggest that independent advice is a waste of time, but it is believed that advisors who are solicitors or businessmen will focus on the finer points of terms of remuneration, percentage points, royalties and so-on, these being elements of the contract which they feel empowered to manipulate and influence on behalf of their client. Offering behavioural advice and relationship guidance of a more personal nature might be perceived as a rewardless departure. Furthermore, the artist or writer should beware that once an independent advisor is in place the judiciary will consider it quite proper to impute that advisor's potential for greater knowledge and understanding of the

finer points and long-term implications of the contractual terms to his 'principal', the artist.³²

Singer/songwriter George Michael likened his relationship with his record company, (CBS/Sony)³³ to a marriage. This analogy is considered most appropriate here, for it is often the case that at the formation stage of these contracts that the artist or writer is consumed with excitement and a passion for the other party, which is tantamount to lust. There are exceptions, notably here the *Ryder v Nicholls*³⁴ case where the artist showed no interest in paperwork whatsoever and it was the manager, Mr. Nicholls who may have been impatient toward gaining his signature. However, once the initial excitement and drive to interact has subsided and a steady, long-term commitment of fidelity is unfolding other issues come in to focus. These are issues of trust, achieving expectations and mutual or shared compassion. In at least two high profile instances, for example, artists and record company executives have severed or sought to sever their relationship on the grounds that the executive(s) have failed to support (in the artists opinion) the artist's endeavours to contribute to charitable causes through the sales of specified material. Walter Yetnikoff of CBS records lost Bruce Springsteen to Warner Records when he refused to give company support for an album recorded for charity.³⁵ Later, George Michael complained during his dispute with Sony³⁶ that the Company had had failed to properly market albums released to raise funds for charity. These types of personal dispute and disappointment of expectations can amount to irreconcilable breakdown in relationships. Gilbert O'Sullivan's dispute with MAM³⁷ may appear to have been triggered by a lack of attention, following his manager's decision to devote most of his time to his zoo in California while the artist was left to get on with his (now well established routine) job of creativity and performance. Conversely, the initiation of the dispute between artist Sean Ryder and his management company, Nicholls and Dimes (Mr. and Mrs. Nicholls) was that the Nicholls' income was reduced significantly after their primary employer, the recording company to which they had assigned Ryder, no longer employed them. They shortly discovered a flaw in their own contract with Mr. Ryder which meant that they were charging tour commissions on Ryder's net income rather than on his gross income – a costly difference. Sean Ryder's advisor sought to rely on the exact terms of the agreement and

when negotiations broke down over this issue he sought to terminate the agreement on the grounds that it had been induced by undue influence and was in restraint of trade. The artist himself played little or no active part in the run up to this dispute, his attitude was that “paperwork freaked him out” and that it “did his nut in”.

Following this kind of disillusionment and disappointment in a relationship, some parties will never enter into another relationship of this kind again. For example, in private conversation Lonnie Donnegan (an artist who is held in high esteem by others and who has influenced many through his musical creativity and style) has expressed a high degree of mistrust for music industry executives to whom he generically refers as ‘suits’. These relational breakdowns become bitter testimony to the cost in hurt feelings and loss of confidence which can amount to an incapacity to continue to generate revenue-earning product.

For some artists or writers initial grounds for dispute are triggered by a chance meeting with another party who appears to be promising a better future than the one which they currently face. This may provoke the desire at least to have the existing contract declared void, or even to purposely breach the current contract (by any means available). If this seems to have little to do with contract law or business in general then it must be remembered that this industry is in the business of setting up and selling peoples’ feelings and dreams. While contract law could not and should not be considered to operate in any way comparable to any form of divorce court,³⁸ it should surely be able to be a better advisory body for these kinds of relationships that it is at present. These, after all, are not spot-contracts capable of being kept fair by methods of legislation like consumer law but are contracts of which the very intention is to forge a long-term, successful relationship.

On the matter of advice, legal and financial advice are a must for the inexperienced both in the creative and the corporate fields. The caveat being that the advisor, at present, is not wholly accountable for the outcome of acting on his advice. Even if, as in Sean Ryder’s case, he largely performs business activities on his principal’s behalf, it is the artist and the corporate parties who remain principals to the Agreement and who are

bound and obliged by its terms. If not altogether achieved, at least the importance of a fair bargain is well recognised in this industry nowadays. Business greed, where it exists is capable of evolving into megalomaniac tendencies, and vice versa, in this highly manipulative and cash rich industry. In the end this type of characteristic, if unchecked may well lead to fraudulent behaviour. The technicalities of obtaining pecuniary advantage by fraud, or the laws designed to redress such damage are not the object of this discussion. However it can be recognised here that some kind of behavioural husbandry (to be suggested throughout later text, as an approach toward improvement in contract law) could very well curtail this problem.

It must be pointed out early on here that the majority of this discussion portrays artists and writers as individuals. The discussion turns on the relationship between those individuals and other, more corporate, parties with whom they contract in this industry. Where the artist or writer is, in fact, constituted by a band or group it is assumed here that their responsibility to the contractual relationship is allocated on a joint and several basis. For the sake of clarity, in general discussion they will be referred to as if they were an individual. If instances are found where individual band membership is relevant to the following discussion then that will be clarified *in situ*. Similarly it is recognised that any corporate body, record company, publisher, management company or agency company will be made up of many individuals.

However the artist's relationships tend to revolve around one or two personal contacts from within such an organisation and these relationships are core to the discussion in hand. These relationships are bound by the personal characteristics of individuals as much, if not more than by corporate missions and objectives. For example when an individual leaves a corporation, such as when Walter Yetnikoff left Sony, the remaining party will be left to shift his concentration on to relationship building with the new replacement. This might be a smooth transition bringing improvement to the relationship as a whole as well as improving productivity. On the other hand, as with George Michael,³⁹ the departure might mark the beginning of a breakdown, or even an excuse to manifest a latent desire for breakdown in the contractual affair.

As stated above, from a legal point of view it is wise to ensure that at the time of departure all long-term obligations are either severed or carried forward openly and in good faith.

As artist and writer generally desire long and stable careers, the key to success will be a contract which accommodates that longevity and all the events, personal and business, likely to occur. To prevent entrapment on either side, this is generally (at least partially) achieved by the incorporation of options to renew within a contract which is otherwise constructed to effect a fixed-term of duration or a specified quantity of releasable product to be provided by the artist or writer within a given time-scale. There will be a *proviso* that material or production is to a certain standard and of a certain genre to match the company's marketing capabilities. A key to the formation of the relationship at the outset is that the company judges the artist or writer to be able to continue to produce this specified type of material for the required duration. Assuming that all goes well the option clauses will be triggered to enable the smooth continuation of the working relationship, but will also provide points in time when re-negotiation of royalties and other variables will be (or should be) possible.

The complaint of many artists and writers is that these opportunities for re-negotiation are mishandled or do not result in furthering achievement of expectations so far as their working relationship is concerned. This is evident in all of the music industry cases discussed later and is particularly expressed in the *Panayiotou v Sony*⁴⁰ case. It is at this stage, as evidence presented in the following chapters shows, that the artist or writer, or the legal advisor, tends to turn to allegations of restraint of trade or undue influence in order to justify intervention at law and to manipulate release by having the contract undone in court, although this action is not always successful.

In the past the draftsmen of music industry standard form contracts have consistently put two assumptions side by side. One, that the corporate party may wish to make a commercial decision to sever the relationship either at time of negotiating options to renew or by giving intra term notice. Two, that the creative party will not wish to sever the relationship which he has, after all, so long craved. They have therefore made the

habitual *faux pas* of omitting from the contract any option giving the artist or writer terms of notice by which he can determine the relationship. This adds fuel to allegations of restraint of trade and should, simply, be corrected.

From a commercial point of view it is surely possible to draft terms of notice which would enable the party to finish the relationship in controlled circumstances, reducing the damage to both parties and probably reducing the tendency to develop the desire to sever just for the hell of it (because it is made impossible there is a suggestion of the 'want what can't have' mentality). Naturally the law will be expected to find undue severity in long-term contracts which do not permit one of the parties to determine the relationship, should reasonable grounds arise. Frequently, as the cases discussed later will show that is exactly how the law does find these agreements. Indeed, in some cases, it may be that this very point is enough to question whether there is an *agreement* at all. The lengthy memorandum that is the all-powerful 'contract' is intended to be protective to the corporation that produces it. But, can it be said that it is good law to impose such a strict liability here, so that the artist or writer's signature represents acceptance of all the terms and that all the terms are, because of that signature, deemed *reasonable*. That will be the corporation's point of view. However late discovery or delayed understanding of the implications of a contract-based relationship seems inherent in the development of the creative party as he matures in his role. There is some doubt felt here as to the overall justness of the most recent precedent,⁴¹ that an artist will be estopped from calling in to question the legal validity of a contract which he has attempted to uphold, say via longevity of performance and compliance with specifiable terms. Such estoppel could be evoked on the grounds that the other party have adjusted their position in reliance on that contract, a condition which could presumably be satisfied by evidence of advance promotional activities or other common-place record or publishing company pre-release activities. The matter of creating a balance between protecting long-term commercial activity as well as offering the personal choice to stay in the relationship will be addressed post.

During interviews and discussions held for the purpose of building this discourse much emphasis is placed by non-lawyers on the complexity of the paper contract and the

ability of the non-expert artist or writer to fully comprehend it. But, while the concept of plain English, for example, might be supportable to some degree, it is felt here that it is quite wrong to encourage creative parties to levy this argument as it must become circular and will amount to nonsense. Although, *prima facie*, a contract is an agreement between two parties, music industry business depends on a myriad of parties each supporting the others. As stated above⁴² a publishing contract must allocate the percentages of percentage based royalties to the publisher; percentages of those percentages to sub-publishers; percentage returns to the composer(s) from the publisher and from any sub-publishers; tax deductions and other calculations covering currency values in different (world) territories; some operated by the publisher and some by sub-publishers; application of copyright implied terms;⁴³ declarations of originality of the works to be produced; how, when and by whom copyright rights might be transferred; what (if anything) will not be protected; how any existing contractual obligations must be transferred in due course such as post contractual ties in works published initially by other publishers; how territories will be defined and how they might be varied in the future; who the parties and sub-parties to the contract are or can be; options for renewal and termination or notice arrangements and who will be responsible for the collection and distribution of performance royalties on the material once it is released. Add to this periods for payment of due fees; royalties and incomes; periods for accountability when the publisher must inform the composer(s) of all transactions on their behalf and any embellishments such as agreements towards promotional activities and, even in the plainest of English this is a lengthy and complex document. What is more, as the industry progresses in to the twenty first century and internet marketing increases (which exposes material to the whole world but which offers no territorial boundaries or scope for protecting territorial 'sales') these contracts are likely to become more rather than less complex in terms of apportioning rights to the artist or writer and any companies involved. The technicalities inherent in these clauses represent the manifestation, on paper, of the expertise and skill of the corporate party. They cannot, of course, even outline personality traits or individualistic characteristics on the part of the company or the composer(s). Therefore, there should be developed some built-in provision for action or method for measuring these traits, which can be incorporated into the contractual relationship and which can cause co-operation on the part of both

parties as the relationship progresses. In incorporating such qualitative *extras* the parties should be able to rest assured that the initial commercial intentions will not be reduced, but rather that this can be a method for enhancement of such aims.

All of the above must equally apply to record company, management and sometimes agency agreements in this industry. These can be equally as complex and could be equally enhanced by the inclusion of the provisions here. The discussion which follows centres around cases spanning several decades of music industry activity and views the application at law of the principle of unconscionability (in various guises). It is felt that this will show repeated proof of the need for the law-based drive for the enhancements suggested.

END NOTES

- ¹ *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816: *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901
- ² *ibid.*
- ³ See Appendix 4 and below at 12: *A Paradigm of The Artist – Built From Survey Responses and Interviews Combined With Information From Relevant Case Reports* at p 120
- ⁴ Largely sourced through L.I.P.A.
- ⁵ See Parker J. in *Panayiotou v Sony* [1994] EMLR 229; at 350 2 et. Seq. and 357 6 et. Seq.
- ⁶ *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616
- ⁷ For general study in the area see: Macneil I. R.; *Contracts: Adjustments of Long-term Economic Relations under Classical, Neo-Classical and Relational Contract Law*, 72 Northwestern University Law Review; 854
- ⁸ See: *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901
- ⁹ In each of the cases which have been read in pursuit of this research the artists have expressed that their wish is to be released from the relationship by what ever means possible.
- ¹⁰ *Panayiotou v Sony* [1994] EMLR 229; The Times June 30 (1994)
- ¹¹ *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816: *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901
- ¹² See Appendix 6
- ¹³ e.g. Copyright Acts 1775, 1842, 1911 and 1956; Copyright (Computer Software) Amendments Act 1983; Data Protection Act 1984; Copyright Designs and Patent Act 1988; Broadcasting Act 1990; Cable and Broadcasting Act, 1984; Competition Act 1980, Companies Act 1948, 1967, 1976, 1980, 1981, 1985; Taxes Management Act 1970 – This list is by no means exhaustive, however, it serves to illustrate the suggested legislative nature of ‘business law’ by comparison to judge made Common-law Contract, equity and the principles of public policy which lie at the heart of this discussion.
- ¹⁴ For a strong example see the documented career of George Michael
- ¹⁵ (for a clear example see the actions of Robbie Williams at page 89 below)
- ¹⁶ For an example of this debate: Atiyah P. S.; *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford; 1979
- ¹⁷ Over a period of time it has been observed that companies (and in some cases company solicitors) jigsaw together paragraphs and terms extracted from other contracts, which are then written up by unqualified secretarial staff until, in some instances, the resulting document literally does not make sense. In a legally binding relationship this can be considered most unsatisfactory. It was originally intended to provide example clauses here, however, caution prevails.
- ¹⁸ See Appendix 6 for a good example - Walter Yetnikoff:
- ¹⁹ This type of relationship and the consequences are well illustrated within *Panayiotou v Sony* [1994] EMLR 229; The Times June 30 (1994) discussed post
- ²⁰ Yates D, *Exclusion Clauses in Contracts*, 2nd ed, 1982, Sweet & Maxwell, p2
- ²¹ Stanley H., Powell S., ‘Can You Hear Me Mother?’ *Sandy Powell’s Lifetime of Music Hall*, 1975, Jupiter Books, p 75 et seq.
- ²² Such as the well documented, benchmark case *Warner Bros. Pictures Inc. V Nelson* (1937) 1 K.B. 209
- ²³ [Television] Ch4 Saturday 21st December 1997, Tribute TV/Faction Films; Production Manager Anton Kutze
- ²⁴ *ibid.* No rights were assigned or appointed over songs written or originated in these recording sessions and no royalties or benefits were paid.
- ²⁵ For full discussion about the development and effect of restraint of trade as a regular allegation in this industry see post page 73
- ²⁶ (1998) QBD U980659 1986 N 816: *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901
- ²⁷ EMI were told that if an artist did not provide suitable material, where there was no contractual condition on him to compose original pieces, then the record company should find alternative material to enable the artist to achieve the minimum recording commitment to the company’s satisfaction: *Barry McKay International Music (UK) Ltd. and L R Jackson v EMI Records Ltd.* (1985)

- ²⁸ i.e. as one grows up one evolves ideals and principles, experience of life alters ones expectations, development of expertise may transmute raw enthusiasm into confidence - all of which changes the way relationships are dealt with and business is approached. See the case history surrounding *Panayiotou v Sony* [1994] EMLR 229; The Times June 30 (1994)
- ²⁹ See: *A Schroeder Music Publishing Co. Ltd. v Macaulay* [1974] 1 All ER 616 - discussed in detail post
- ³⁰ This tradition may be subject to change. See discussion about *Undue Influence*, or vicarious undue influence arising out of cases such as *BCCI v Aboody* at page 59
- ³¹ See: *A Schroeder Music Publishing Co. Ltd. v Macaulay* [1974] 1 All ER 616 - discussed in detail post, but contrast with Lord Parker's approach in *Panayiotou v Sony* [1994] EMLR 229; The Times June 30 (1994)
- ³² See *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816; *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901
- ³³ *Panayiotou v Sony* [1994] EMLR 229; The Times June 30 (1994) See Also: The Sunday Times; 17 October; 1993; p 7
- ³⁴ *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816; *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901
- ³⁵ See Walter Yetnikoff; Appendix 6
- ³⁶ *Panayiotou v Sony* [1994] EMLR 229; The Times June 30 (1994)
- ³⁷ See p 64: 5:2 Gilbert O'Sullivan
- ³⁸ As perhaps suggested via George Michael, above page 26
- ³⁹ See full discussion about George Michael, his relationship with CBS/Walter Yetnikoff and the following problems with Sony after Yetnikoff was gone from the company page 132 et seq.
- ⁴⁰ [1994] EMLR 229; The Times June 30 (1994)
- ⁴¹ *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816; *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901
- ⁴² supra page 19
- ⁴³ Data Protection Act, 1988

2: The Hypothetical Doctrine of Unconscionably Constructed Contracts

A Suggested Structure for the Building of Good and Qualitative Long-term Contractual Relationships
The Purpose of the Doctrine of Unconscionably Constructed Contracts:

2:1 General

2:1:1) To influence behaviour and provide an aid to expectation management between those entering into long-term contractual relationships in the music industry

2:1:2) To provide substantive tests to establish whether a contractual dispute has as its root cause unconscionable construction of the contract

2:1:3) To provide guidance toward the remedy of such a dispute as might be identified at 2), but not to dictate quantum or other individual, measurable remedies

2:2 The Parties

2:2:1) To enable those whose lifestyle, livelihood or business depends on long-term contractual relationship to come together in good faith and build a relationship which will be able to progress through personal as well as business-based circumstantial changes.

2:2:2) While allowing the parties to maintain a high degree of co-operation and flexibility in their dealings it is essential that the integrity of their relationship under the law and the bonding effect of the principle of binding contract is not undermined, so that the parties shall at all times carry obligations to each other which are represented by the contract itself.

2:2:3) Both parties should have, as a right, trustworthy independent advice.
(Stipulations regarding the advisor are given at 2:5 below)

2:3 General Scope

2:3:1 To address the conduct of parties during the formation of a long-term, contract based, business relationship

2:3:2 To address the maintenance of long-term, contract based, business relationships

2:3:3 To address the conduct of parties to long-term, contract based, business relationships in the event of disputes of the nature described at 5)(d)

2:3:4 Disputes to be addressed here shall be those which indicate a failure of one or both parties to maintain realisation of expectations which are not necessarily financial gains, but which might influence financial gain where the stages of breakdown leading to the dispute affect productivity or marketing activities but while breakdown itself is alleged to have been caused:

- i) by onerous restrictions brought about by the express terms of the contract where those restrictions have become evident to the complainant whilst continuing to attempt to perform relational obligations
- ii) by failure to maintain reasonable good faith within the performance of the dealings conducted between the parties
- iii) by failure to maintain a duty of reasonable trust within the performance of the dealings conducted between the parties
- iv) by a breakdown in understanding of obligations within the performance of the dealings between the parties
- v) by a breakdown of ability to
 - a) maintain plans for future performance expectations within the relationship
 - b) agree ongoing plans for future performance expectations within the relationship
- vi) by failure on the part of the parties co-operatively to be able to identify an agreement due to misinterpretation by both parties of the expectations expressed or intended to have been expressed at the outset of the relationship, where the relationship has continued to progress so that the contractual element of the relationship imposes some binding obligation
- vii) where flexibility of commercial attitudes and beliefs on the part of either party, over a reasonable period of time, causes the portion of the relationship which is beyond expression within the written contract to breakdown, but which does not strictly prevent performance of the obligations as captured within the contract except that continuous performance of such obligations would become sufficiently unacceptable to the reasonable sensibilities of one or both parties because of the shift in the potential-market perception and marketing intentions of the

complainant when compared to the potential-market perception and marketing intentions of the other

- viii) any other failure or breakdown in the relationship which is capable of being generically classified as being reasonably similar to categories I) to vii) above.

2:4 Suggested Conduct and The Terms of an Agreement

2:4:1 Under the head of the contractual principle of Agreement; the Offer, the long term intentions of the Offeror, the expectations of the Offeror and any areas of exchange, trading or other dealings where the Offeror is not prepared to be flexible or co-operative toward change must be clearly described during negotiation and clearly represented at the time of Agreement

2:4:2 Determination clauses must be clear and inclusive of terms by which the Offeror is prepared to release the Offeree from further or future obligations in the event of the Offeree desiring to change or alter any part of his performance under the relationship in a manner or in circumstances which the Offeror has clearly identified within the Offer as being unacceptable areas for change in the performance of the relationship and/or which can be caught under the definitions of cause for breakdown under 3:4 i) to iiiv) above

2:4:3 The Offeror shall have a duty to take into account in preparing the Offer; the age of the Offeree, the degree of experience of the Offeree in entering into such agreements; the current pattern and evidence of any pattern and style of performance, specific to the nature of the relationship, which the Offeree has exhibited in the past and which the Offeree is obliged to expose during the formation of this Agreement

2:4:4 The Offeror has a duty to ensure that the Offeree has received and clearly understood the contract as a whole, inclusive of the terms of co-operation and flexibility and the terms of determination

2:4:5 The Offeree is obliged to incorporate into the contract the long term intentions of the Offeree, the expectations of the Offeree and any areas of exchange, trading or other dealings where the Offeree is not prepared to be flexible or co-operative toward change

2:4:6 The Offeree is obliged to ensure that he has read and understood conditions regarding future variations, co-operation and flexibility clauses, taking independent advice where necessary

2:4:7 The Offeree is obliged to expose, during the period of negotiation, evidence of any current pattern or any past pattern of style of performance, specific to the nature of the relationship which might affect the long-term performance of the relationship

2:4:8 The Offeree is entitled to ensure the incorporation of any reasonable terms or reasonable variation of terms of determination which might protect his future course of dealing with the Offeror or with any other party in the same or similar industry

2:4:9 Both parties should incorporate into the contract a *commitment to communication*; due to the long-term nature of the life of the contractual relationship the parties should agree to regular *settlement meetings*, possibly to coincide with other annual account settlements. It should be agreed that the terms of the contract and the nature of the relationship should be reviewed. This arrangement should not have the effect of enabling either party to bring about premature determination of the Agreement, but should serve to bring the parties together and remind them of their obligations to each other. If such a meeting should expose frustration of expectations or other breakdown within the relationship such as falls within the definitions at 2 i) to iiiv) above and which cannot be resolved by reasonable co-operation then the parties can agree to proceed to wind down the relationship in a structured manner in accordance with the determination clauses in hand

2:4:10 Where the initial Agreement is reached within four months of any commercial, marketing or other production deadline (e.g. Christmas sales) then the parties should be obliged to arrange the first *settlement meeting* within six months post deadline

2:4:11 The initial Agreement, under such circumstances, should incorporate an additional reasonable term that enables variation to the long term effects, statements of expectations and express determination conditions, such as are reasonable to both parties and are agreed by both parties.

2:5 Advisors

2:5:1 Where independent advice is in the hands of a business manager, an agent or any other party who stands to gain benefits which can be identified as deriving directly from

the successes of the long-term relationship then that party might also be recognised as gaining third party rights and obligations arising from and towards the validity of the contract as a whole.⁴⁴ To be in accordance with the Contract (Rights of Third Parties) Act 1999S1 ss(3) a third party *must be expressly identified in the contract by name, as a member of a class or as answering to a particular description* if he is to be able to enforce his rights to benefits from the contract under this Act. It is possible, for example, that an advisor who is paid by commission which is directly linked to the income of an artist or writer, may be invested with rights, not only in the timely payment of the artist but also in the proper performance and conduct of the relationship so as to maintain an income which can be stipulated as reasonable given all the circumstances. The extent of that possibility can only be speculated as there is not yet judicial interpretation of the Act to give guidance as to how far reaching it can become. However, the Law Commission Report No. 242, makes it quite clear at Section B, Preliminary Issues Part III, 3.33(iii), that the remoteness of damages rule will still prevail, also that the third party will be responsible for mitigating his losses and that no award for specific performance will be made in relation to personal services. There is much for an advisor to gain from the longevity of his own appointment. That must depend upon his advice leading his client to a contract in good faith and upon his encouragement of honest and timely dealing between the principle parties during the life of the contract. It seems, therefore unjust if the advisor is not additionally invested with some degree of responsibility. In the Music Industry such parties tend to be in a role which intervenes in the act of negotiation and the continuance of contractual performance. Alongside this, specialists naturally form their own beliefs about individuals, companies and markets which are passed on as influences to the client's beliefs about his relationships. However, in the House of Commons Debate, on the Contract (Rights of Third Parties) Bill,⁴⁵ which was expressly intended for inclusion in the Hansard Report for future judicial guidance, The Parliamentary Secretary, Lord Chancellor's Department. Mr. Keith Vaz, made it clear that

... the Bill does not change that part of the rule under which a burden cannot be imposed on a third party without his prior consent.

It is felt here that a burden of duty must be imposed upon Music Industry Advisors and that if they do become recognised as third parties in accordance with the new Act then

this should be included in judicial consideration. Realisation of such burden should not be a surprise to an individual whose suggestions and activities have such a high degree of influence.⁴⁶

2:5:2 If there is felt to be no necessity to incorporate the Advisor under the Contract (Rights of Third Parties) Act 1999, the principle Agreement should incorporate a quasi-contract which imposes on the Advisor an obligation to ensure that (a) he is acting in the best interests of the principle party whom he represents and (b) that he will not issue any advice or cause to be incorporated any term or condition which has as its purpose the effect of damaging or reducing the expectations of either principal beyond what is reasonable

2:5:3 The Advisor should be obliged to reveal, on demand, at the time of negotiation, to either party, any qualification, experience or other grounds on which he holds himself out as being fit and proper to impose such advice as may vary or otherwise affect the Agreement between the principles. Failure to question the capacity of the Advisor during the time of negotiation would render him immune from post Agreement complaints or grievances arising from action taken due to his advice unless such complaints or grievances give rise to the discovery of fraud, misrepresentation or other illegalities in the formation and performance of the Advisor's duties or the representation of his capacity as fit and proper to perform such duties.

2:6 What Follows and Why

Having set out the principle suggestions for the procedure for building a *conscionably constructed contract* (i.e. good and well considered long-term contractual relationship formation), this discourse will now turn to an examination of the developments at law and the developments in relevant music industry cases which gave rise to the suggestion of the need for the *doctrine of Unconscionably Constructed Contracts*. This will be followed by an analysis of the nature and characteristics of the individuals who make up the classes involved in music industry contract cases. Finally, there will be an examination of the methodology which it is felt could be adopted in court for examining the validity and enforceability of long-term contracts and long-term contractual relationships. This will attempt to show the valid operation of selected tests and principles. What are considered essential elements for such a doctrine have been

selected from both academic proposals and established legal and judicial practices. However, with a modicum of exceptions it has been found that some of the principles to be utilised here have required re-interpretation, re-defining or re-analysis. This is not altogether surprising, as these principles in their existing form or context (as established in the overview of relevant developments) have not been subject to mutual examination for any similar purpose. In its existing form each principle has been severally interpreted, analysed and debated but, it seems, each has not satisfactorily address or resolved the specific issues which this discourse attempts to address. It is also to be desired that the outcome of the following re-working and interpretations should be sufficiently exoteric to answer the very purpose which initiated the work. That is, to discover and understand the purpose and integrity behind the following principles, without over hypothesising each point and then to reduce the conclusions to a pattern and language which can be readily absorbed by the intended recipient parties as well as interested onlookers. Thus it is anticipated that this fresh review will go beyond highlighting observation and opinion to actually give rise to a potentially workable solution. Whether this will ever be adopted in practice or tested beyond this paper remains to be seen. The contiguous nature of the principles as well as their relevance to the music industry will be expounded, where appropriate, throughout.

END NOTES

⁴⁴ For a more full discussion on this matter see Appendix 8

⁴⁵ Second Reading, 29 June 1999, at para 8.

⁴⁶ See for example the role and high level interaction carried out by the advisors to George Michael and Shaun Ryder as examined from pp 130 below.

3: The Emergence, in English Contract Law, of the Principle of Unconscionability; Judicial Recognition of Relational Subtleties

The suggestion of a stand-alone doctrine of unconscionability is not new. Exploratory research in this area quickly reveals challenges such as Enman's: "*. . . why has the equitable doctrine been narrowed in England and expanded elsewhere?*"⁴⁷ In addressing this challenge and examining the value of pursuing the generation of such a principle the conclusion reached is that while the concept, in one guise or another, has been alluded to, defined, discussed and even held up as a prop for the rationale of decisions in court, there are undetermined factors in operation which abate independent development of the equitable doctrine of unconscionability *per se*. It is felt here that while on the one hand the development of common law contract rules and their place within sectors of the business community may be the simply be the natural principle of evolution at play, on the other hand, like organic evolution, the selection process for cross matching (in this case of principles rather than genes) must not be a suppressive event acted out as a result of the instinctive response of one judge at a time, given one case at a time.

While it is natural and proper that actual changes in common law involve lengthy deliberation, consideration and therefore time, it is believed that it was never intended to be sluggish or inaudible. However, in an increasingly fast moving information driven culture, it certainly gives that perception. Given the speed of commercial and technological progress in the latter part of the twentieth century, a more suitable course for further development would surely be found through open, collective reasoning between the judiciary, more positive manipulation of the process for the selection of principles and rules due for modernisation, in addition to which the desired legal effect would be better extricated by the proper use of modern communications techniques.

It seems odd that rigorously trained specialists in the English legal system spend days, months or even years, researching progress in certain areas of law and then giving a mere summarised delivery of their learned beliefs to the limited audience in court. In terms of informing 'the man on the Clapham Omnibus' this process depends on reports read only (in the main) by other specialists, or on the interpretations of dedicated

journals. Neither government nor any currently operating business clings to such an antiquated plan. The market for new law-based behavioural policies is huge as well as fragmented, so that it needs fast generated, well constructed, new business law. In a business environment where marketers no longer talk of five-year plans, but change policies sometimes quarterly, this new law needs to be more rapidly formulated, easily understood and easily escalated into mainstream business plans. Because it is true to say that there is no distinguishable doctrine of *unconscionability*, or no doctrine of *good faith*, per se, in operation in English common law due to the slow, traditionalised progression of parent principles through the cases which are discussed below, it is felt that this is an opportunity to highlight development needs in this area and utilise these to attempt to instigate progressive change. Inevitably, there will be those academics and practitioners who feel that “unconscionable” should be retained simply as an adjective, useful only in the part it plays in the language of deliberation.

3:1 The Development of Judicial Attitudes

While the methodology for the development of common law principles might, if one agrees with the point of view held here, be jejune to the modern business world, tracing the evolution of the principle and spirit of unconscionability does reveal an historic judicial tendency to respond to contemporary issues of sociologic, economic or political trends.⁴⁸ For example, and most pertinent to the development under discussion here, the dominant cultural shifts caused by the Industrial Revolution⁴⁹ which inevitably reorganised the economic stresses of land ownership, and thus shifted expectations towards inheritance and wealth, also inevitably engendered fresh moral, political and economics based attitudes. This change period unquestionably had the effect, while bringing befuddled expectant heirs before the courts, of shaping the judicial dogma and responses.

This area of study also reveals that the judiciary has a history of sensitivity to the relational subtleties that play a crucial role in the formation and carrying on of contractual relationships. Research is able to turn up many instances where the judiciary have both observed relational subtleties and, in response, called not just on Equity, but on the specific concept of disallowable, unconscionable behaviour. To arrive at the

desired moral, just or public-policy based juncture, the judiciary frequently embark on excursive discourse on matters in general as well as the matter in hand. As a result each example of judicial exhortation, while it does carry the power of persuasion, does not set in stone any boundary for the operation of a principle of unconscionability. Broadly speaking this may be to the merit of the machinations of Equity, but following any one instance this form of delivery can only offer sweeping, moralistic guidance. This cannot impact on the general behaviour of a class of people because it represents untargeted observational comments, whilst the *ratio decidendi* and any remedy are kept unique to the case in hand.

3:2 The Historical Progress of Unconscionability as a Legal Concept

Because case by case analysis of precedent is the method for progress for English common-law principles, it is also the only method for determining what has been shed or avoided along the way, and why. Whilst the *what* part of that question remains the simple gathering of facts, the *why* element continuously evades satisfactory answer.

For example, in *Vernon v Bethel* Lord Henley L.C. observed that:

*. . . necessitous men are not truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.*⁵⁰

This clearly indicates an understanding of human interaction and a realisation that unfair play was at hand. Lord Henley L.C. has voiced an understanding of socio-economic pressure upon individuals and by use of the words *crafty* and *impose* has expressed disapproval of certain devious tendencies on the part of certain parties engaged in capitalistic endeavours. Why not, then, state just as clearly that this is unconscionable behaviour and as such is *illegal*?

Other cases, which illustrate the same judicial sensitivity alongside typical socio-economic pressures of the era, include *Gwynne v Heaton* in which Lord Thurlow L.C. said:

*The heir of a family dealing for an expectancy in that family shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not only be looked on as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed.*⁵¹

The court here is clearly operating to uphold public policy. During the 17th - 18th centuries this area of law sought to bring more and more emphasis on the protection of family heritage. A principle with which the judiciary, perhaps naturally, empathise. The ready recognition of the plight of expectant heirs and the weaknesses of young men in society was reflected in that empathy. This must raise a question about how much emotional harmony the judiciary need to have with those in contest before them, it may be that varying degrees of empathy are responsible for varying degrees of application of public policy or Equitable remedy. So again an unconscionably constructed contract has been disapproved and the feeling is evoked here that it is the nature of personal bias which leads a judge to invoke public policy to support his rationale. It is also felt here that it is some degree of consciousness of that bias (as any justification framed in *public policy* can only be a contemporary socio-political thought) which precludes him from formalising that rationale into a rule.

Another strong example of the spirit of judicial understanding can be seen in *Evans v Llewellyn*,⁵² where Lord Kenyon M.R. explained:

*The cases of infants dealing with guardians, of sons with fathers, all proceed on the same general principle, and establish this, that if the party is in a situation, in which he is not a free agent, and is not equal to protecting himself, this court will protect him.*⁵³

While time and the nature of business inter-actions have progressed, this spirit of sensitive observation has continued. Unconscionability has continued to be disapproved. This is demonstrated by the recognition of “surprise” in *Walters v Morgan*⁵⁴ and also that “. . . *the conduct of the party applying for relief is always an important element*”.⁵⁵ However, although these cases prove that the judiciary have recognised an underlying principle of human weakness, and have addressed it through the operation of law of an equitable nature, they have continued to fail to give the procedure specific title or regulatory attributes.

They have, however, discussed this very failure to the extent that:

⁵⁶. . . *it is sufficient for the application of the principle, if the parties meet under circumstances [as, in the present transaction,] to give the stronger party*

dominion over the weaker, and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience and moral imbecility.

3:3 From the Concept of ‘Not equal to Protecting himself’⁵⁷ There is Evidence of Judicial Attempts to Create a Stand Alone Doctrine. But There is Further Evidence that the Principle of Public Policy Engenders Broad Scope Approaches Rather than the Birthing of Distinctive Rules

Not only do the series of cases presented here prove a judicial understanding of the human nature of the problems in hand, but they also give evidence that the judiciary have, even if subliminally, made attempts to frame a distinguishable set of rules within a defined principle. Progress may have been hampered by the very nature of Common Law itself. As has already been expressed, each attempt has been made in isolation and can only be progressed if subject to affirmation and encapsulation within the sequence of cross-case debate. As a result it was possible for Lord Sullivan M.R. to throw the principle wide open by stating that:

. . if two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take undue advantage of the other whether by reason of distress, recklessness, or wildness or want of care, and where the facts show that one party has taken undue advantage of the other by reason of the circumstances I have mentioned, a transaction resting upon such unconscionable dealing will not be allowed to stand, and that where parties were not on equal terms, the party who gets the benefit cannot hold it without proving that everything has been right and fair and reasonable on his part.⁵⁸

What Lord Sullivan M.R. has said here does encompass the principle. He defines behavioural traits which are otherwise often discussed in isolation. He defines the broadest scope of undue influence⁵⁹ and uses the term *unconscionable* to support his argument.

Central to the core of the hypothesis here is that such broadness of scope continued to render uncertainty to the future structure of any potential rules for behavioural governance which contract law, it is felt, must set out to provide.

In essence, public policy, it seems, is the fortification of the idea that a man should be free to enter into *any* [legal] contractual obligation he chooses. This on the proviso that he enters that contractual obligation of his own free will and intention. Indeed this policy is so deeply rooted in the mind of the public that the majority can be found to believe that any agreement, once entered, is irreversibly binding. There is often difficulty in persuading the man on the Clapham omnibus of the legal protection and restrictions which prevail in his favour. None-the-less, the public demands that the law intervene when a contractual dispute becomes burdensome and the consequences seem unfair, that is how these cases get to court. What must be guarded against is that which Pollock QC identified rather poetically in the George Michael case⁶⁰ quoting from the Rubaiyat of Omar Khayyam:

*Ah love thou and I with fate conspire
To grasp this sorry scheme of things entire
We would not shatter it to bits – and then
Re-mould it nearer to the hearts desire*

*. . . a Plaintiff may (depending on the circumstances) be doing little more than
inviting the court to improve the terms of his bargain. . .*

Vis-à-vis this colourful exposition the conclusion which is reached here is that the term *public policy* is the label for a fantasy tool. Surely, as the law exists at public demand, to counsel, and intervene whenever a man exercises his right to contract because no contract is perfect, the law itself is *public policy*. With that in place, to pretend that any contract can be drawn up to perfection is, probably, as Parker J. puts it⁶¹ “to ignore the wider aspects of commerce”.

3:4 The Conceptualisation of Inequality of Bargaining Power – A Notion of Public Policy

In the influential case of *Fry v Lane*⁶² Kay J. supported the conjoint opinion of Lords Harwicke and Selborne that there is an element of ‘fraud’ not in the strict criminal

definition but in the nature of “*unconscientious use of power arising out of [these] circumstances and conditions*”. The judiciary do make careful distinctions over the nature of the parties before them such as that offered by Lord MacNaghten in *Samuel v Jarrah Timber & Wood Paving Corp. Ltd.* that:

The directors of a trading company in search of financial assistance . . . are certainly in a very different position from that of an impecunious landowner in the toils of a crafty moneylender. ⁶³

Of the parties to that case he also noted (significantly here) “*each of whom was quite sensible to what they were doing*”⁶⁴ and that there was a “*perfectly fair bargain*” in place. The principle at issue was that there was an onerous condition attached to the mortgage under question: i.e. the contract was one of *unconscionable construction*, demonstrating potential to cause hardship under certain conditions during the course of a long-term relationship. However, rather than the development of a doctrine of unconscionability, the judiciary have followed a course which lead Lords MacNaghten and Sullivan M.R. to be suggesting, *alias dictus*, ‘inequality of bargaining power’. Lord MacNaghten in this case also recognised the super-added obligation of solus agreements (the import of which shall become clear later).

When dealing with matters footed in public policy, then, it seems that the judiciary proceed with extreme caution and remind themselves that “‘*unconscionable*’ *must not be taken as a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other*”.⁶⁵ But public policy makes demands on the conscience⁶⁶ so that, in the wake of Lord Radcliffe’s advisory comment *Meggary J.* still could not withhold from ensuring that he did not narrow the scope of the principle:

What has to be considered is, first, whether the plaintiff is poor and ignorant; second, whether the sale was at considerable undervalue; and third, whether the vendor has taken independent advice. I am not, of course, suggesting that these are the only circumstances that will suffice; thus there may be circumstances of oppression or abuse of confidence which will invoke the aid of equity. ⁶⁷

In response to the difficulty of applying such an undefined doctrine with such unlimited scope, as this particular path of progress in law has continued, practicable questions became a needs-must such as that proposed by Lambert J.A. :

In my opinion, questions as to whether the use of power was unconscionable, an advantage was unfair, a consideration was grossly inadequate, or bargaining power was grievously impaired . . . are really aspects of a single question. That single question is whether the transaction, seen as a whole is sufficiently divergent from community standards of commercial morality that it should be rescinded. To my mind, the framing of the question in that way prevents the issue from being obscured by an isolated consideration of a number of separate questions. ⁶⁸

This proposal at least suggests an approach, while by comparison, cases such as *Multiservice Book Binding Ltd v Marden* ⁶⁹ offer characterisation but do not fully specify how to distinguish that an event of the prescribed character has been described to the court.

3:5 The Continued Development of the Pseudo-Rule, or Principle, of Inequality of Bargaining Power

The judiciary has determined one dominant formula significant to the study here. Following Lords Sullivan and MacNaghten⁷⁰ legal fault can be apportioned where there is an unconscionable bias of gains coupled with inequality of bargaining power. However, this principle is never relied on in isolation. Adding to the loss of clarity for those wishing to interpret or encapsulate the law, is the fact that although Common Law and Equity rarely, if ever, share common specific content, the arena in which inequality of bargaining power will be engaged may be a case for Common Law restraint of trade or Equitable undue influence.⁷¹

With a strong desire to raise inequality of bargaining power to the status of a tried-and-tested doctrine at law, Lord Denning M.R.⁷² offered it as alternative grounds for his decision. In doing so, he attempted to bring together those cases where he believed such inequality to have been a decisive factor:

Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find the principal to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power such as to merit the intervention of the court. ⁷³

But as Treitel⁷⁴ has pointed out, in common with its parent principle unconscionability, inequality of bargaining power has no ‘clear limits’ except Lord Denning’s statement that: *“No bargain will be upset which is the result of the ordinary interplay of forces”*. In *Pao On v Lau Yiu Long*⁷⁵ the Privy Council could not find the contract voidable for duress, or invalid on grounds of procurement by “unfair use of dominant bargaining position”. Lord Scarman said on the matter that: *“To treat this as a grounds of invalidity distinct from duress would be unhelpful because it would render the law uncertain”*. He repeated this opinion in *National Westminster Bank Plc v Morgan*.⁷⁶ In response, it is felt here that there must be occasions when judges such as Lambert J.A. or Lord Denning have sat back in private and sighed . . . ‘well I thought I had offered certainty, clarity and indeed explicitness’, ⁷⁷ but on the part of the many conservatism and caution have prevailed.

END NOTES

-
- ⁴⁷ Enman S. R.; *Doctrines of Unconscionability in Canadian, English and Commonwealth Contract Law*, Anglo-American Law Review; 16 1987; 191 at 192
- ⁴⁸ As discussed at length by Atiyah in *The rise and Fall of the Freedom of Contract*; Clarendon Press, Oxford, 1979 and R. W. Clark; *Inequality of bargaining power*; *Freedom of Contract and Freedom of Trade*; Carswell; 1987.; p697
- ⁴⁹ England, circa 1730 - 1850
- ⁵⁰ (1762) Eden 110; 28 ER 838 at 839
- ⁵¹ (1778) 1 Bro. CC 1; 28 ER 949 at 9 -10
- ⁵² (1787) 1 Cox CC 333; 29 ER 1191 (Ch) at 193
- ⁵³ *ibid.* at 193 Own emphasis
- ⁵⁴ (1861) 3 D.F. & J. 718
- ⁵⁵ Lord Selbourne LC; *Lamare v Dixon* (1873) L.R. 6 HL 414 at 423
- ⁵⁶ *Aylesford v Morris* (1873) L.R. 8 Ch. App 484 at 490
- ⁵⁷ *Evans v Llewellyn* (1787) 1 Cox CC 333; 29 ER 1191 (Ch) at 193.
- ⁵⁸ *Slator v Nolan* (1876) 11 IR Eq; 367 at 368
- ⁵⁹ Principle to be discussed in full pp 61 et seq.
- ⁶⁰ *Panayiotou v Sony* [1994] EMLR 229 at 356 5.8 et. Seq.
- ⁶¹ *ibid.* at 357
- ⁶² [1888] 40 CL D 312
- ⁶³ [1904] AC 323 at 327
- ⁶⁴ *ibid.* at 327
- ⁶⁵ *Bridge v Campbell Discount* [1962] AC 600 at 626
- ⁶⁶ See Lord Scarman quotation p 94, end note 218
- ⁶⁷ *Creswell v Potter* (1968) [1978] 1 WLR 225 own emphasis
- ⁶⁸ *Harry v Kreutziger* (1978) 95 DLR (3d) 231 (BCCA) at 241; own emphasis
- ⁶⁹ [1979] Ch. 84 at 110
- ⁷⁰ See pp 97
- ⁷¹ In *Panayiotou v Sony* [1994] EMLR 229; Parker J. retained consciousness of the two relevant approaches in case law available to him through comparison with other music industry and relevant cases: to declare the contract unenforceable at *common law* if it were in restraint of trade, or the *equitable* jurisdiction to grant relief if the contract was forged by undue influence and as such was an unfair and unconscionable bargain.
- ⁷² *Lloyd's Bank v Bundy* [1974] 3 W.L.R. 504 - it is felt here that this principle jumps to and from equity and common law cases, Treitel offers detail: *The Law of Contract*; Eighth ed., 1991, 366-374
- ⁷³ *Lloyd's Bank v Bundy* [1974] 3 W.L.R. 506H et seq. Own emphasis.
- ⁷⁴ Treitel G.H.; *The Law of Contract*: Sweet & Maxwell; Eighth ed., 1991, pp 371
- ⁷⁵ [1980] AC 614 at 634
- ⁷⁶ [1985] AC 686 at 780 - see further discussion pp12 et seq
- ⁷⁷ Much care and detail being offered such as Lord Denning's categorisations *Lloyds Bank v Bundy* [1974] 3 All ER CA 757; 3 WLR CA 504 at 507-508

4: The Difficulty in Defining the Status of the Parties When This is Used as a Measure to Justify Intervention at Law, And the Effect of the Principle of Inequality of Bargaining Power

One of the problems in gaining acceptance for the notion of a stand-alone doctrine of unconscionability may be the difficulty felt over defining the status of the parties. It may be argued that this is the reason why the principle of inequality of bargaining power has made such clear progress toward stand-alone development in this area, as will be discussed here.

Where the nature of the relationship appears clear in the minds of the judiciary, then the court has no difficulty. Intervention is justifiable on behalf of the poor and ignorant,⁷⁸ those who may be insane or who are obviously in the weaker bargaining position, and of course, those simply responding to an *unlawful* degree of pressure.⁷⁹ The nature of some relationships is such that the court can see a need for third party advice, and can suggest that the benefitor should have made sure that this was offered before he secured the benefit. Thus there is recognition of the necessity for limitations on certain types of party in order to substantiate the protection of individuals disadvantaged in the circumstances surrounding the agreement such as in *Tate v Williamson*⁸⁰ where Lord Chelmsford said:

The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of the most salutary description . . . The courts have always been careful not to fetter this jurisdiction by defining the exact limits of its exercise.

But surely once one party's dominance in a relationship has been sufficiently recognised to bring into play questions of inequality of bargaining power, the nature of the attitude of contract law will automatically imply a *fiduciary* duty? This prevalent attitude which keeps the scope of justified intervention broad or limitless is all very well, but it does nothing to inform the parties on either side toward what is reasonable or how they should best conduct their relationships.

4:1 Could Principal Parties Find Themselves Unacceptably Categorised into Classes of High Degree Incompetence?

In terms of analysing those who are susceptible to undue influence, an interesting point to observed at this stage is the way in which the judiciary avoid creating legal incompetents. Strictly speaking the singer Sean Ryder⁸¹ was incapacitous when he signed his management agreement whilst heavily under the influence of drugs and alcohol.⁸² Surely this known, constant state of incapacity negates suggestion of ratification of the contract?⁸³ Because of the empowerment of the advisor who acted as monitor, spokesman and quasi-manager, the court in this case did not have to consider this question. However, as other cases have attached great significance on the concept of inequality of bargaining power between artist and corporate party it is necessary to briefly view just how incapacitous an individual can be while the law looks the other way. For an extreme example, the American, Friedman⁸⁴ makes a clear illustration of this in his analysis of the case *Kreuger v Buel*.⁸⁵ He starts with the description of the plaintiff and her circumstances:

The plaintiff, a woman of 55 years of age, had the appearance of and acted like a person of about 75 years, was infirm and childish, broken in health, weak minded and easily susceptible to influence. . . practically a helpless cripple and mental wreck . . she fell into the hands of persons who were able and willing to take advantage of her . . The case is one where . . . an enfeebled old lady of weak mentality had fallen into the hands of Philistines and has been overreached by designing and unscrupulous persons . . . ”.

This strong description leaves the reader in no doubt of the inequality in this relationship and it is an extreme illustration. Friedman goes on to discuss the judicial approach in the light of the doctrine of capacity, and points out:

. . the court (perhaps deliberately) never once spoke the magic word “incompetent” as a basis for granting relief for the plaintiff from an oppressive transaction. Incompetence is not so precise a concept, but it has sharp and serious consequences (loss of power for example) . . . law in the 19th century tended to reject creating a large class of legally incompetent persons. The idea of treating every person, to the extent possible, as an autonomous unit of economic action militated against the creation of new classes of the

incompetent, and encouraged the use of malleable concepts . . which could be applied as needed to situations rather than classes of people”.

The purpose in this portion of this discussion is to make an observation. There is a danger that an industry which continuously alleges undue influence and/or inequality of bargaining power on behalf of one class of party also continuously suggest that one class of party is, to some degree, less competent than the other (though not always to the degree of Mrs Kreuger).⁸⁶ In each music industry case cited here it has been noticed that the judiciary have a tendency to portray artists as “young”, “naïve”, “inexperienced in business matters” and so-on. Add to this the fact that Sean Ryder is not altogether rare in the music industry as being susceptible to mind altering drugs or drink on an ongoing basis. In addition, whatever his condition, he is quite common in the artistic classes, in his adversity to conducting business matters on his own behalf. (That is not intending to say that many artists do not conduct their business affairs admirably for themselves.) However, while it is agreed that the court should continue to avoid reinforcing suggestions of weakness in certain classes of party, and should continue to utilise policies which are *applied as needed to situations rather than classes of people*, as demonstrated by the assumptions and behaviour of the advisor in the Ryder case,⁸⁷ a business or trade community cannot be expected to conduct itself within a specific framework of *good* contractual behaviour while at the same time attempting to second guess the possible interpretation of that behaviour by any one judge.⁸⁸

4:2 Should The Source and Value of Independent Advice Have Measurable Accountability Toward Apportioning Blame and Responsibility?

Suppose, for example, that the Lloyd’s Bank⁸⁹ representative had said to Mr Bundy, ‘You must take independent advice’. Mr Bundy would have had to pay an advisor at costly professional rates and would probably have been told that he must bankrupt his son and keep his house. If that had happened, the bank, the son and Mr Bundy each stood to lose a great deal anyway. Mr Bundy and his son would have faced the deeply unpleasant social stigma and long-term repercussions of bankruptcy which were perhaps more onerous then than now. In the minds of the bank’s representatives, (or, indeed, Mr Bundy) there is nothing to suggest that this scenario would necessarily constitute *reasonable* behaviour.⁹⁰ Not only must the court consider clearly categorising that

which it finds to be unlawful behaviour (as suggested obiter by Lord Denning M.R.⁹¹) but it must progress and structure its categorisation of relationships and provide realistic guidance as to how they should be formulated and carried on. This is what inequality of bargaining power has attempted to do, but handing down the message that a corporation has greater negotiating power than an individual, or a trained salesman than an unsophisticated housewife [which is how it must read to the layman] is an ineffective statement of the obvious. The parties cannot alter what they are, they can only alter what they do. The rules which might surround a doctrine of *Unconscionably Constructed Contract* could offer greater clarity and structure for future guidance.

This study turns to the music industry for analysis and demonstration, simply because that industry is ideally formulated by huge corporations, independent smaller business parties and a myriad of individuals, each dependent on the others for his survival and success. The conduct of business in the music industry is dependent upon long-term relational contracts, and the problems to be analysed here are those that go to the heart of formulating and conducting those contractual relations. On the matter of independent advice, it must be held in mind that music industry lawyers and solicitors can only address matters which their clients ask them to address. The same is presumably true of any independent advisor. This may create something of a paradoxical dilemma as those regularly charged with the duty of giving such advice would naturally become specialists in their field as a result of which, other research confirms, such advisors habitually develop shortcuts or will come to rely on contingency placed damage limitation plans, as demonstrated in the Ryder case, to overcome some of the problems known to develop frequently during long-term, standard form based relationships.⁹² Furthermore, these types of advisor, particularly to the music industry, are continuously fettered by deadlines and their client's drive to get the deal done so that comprehensive advice and the encouragement of negotiation are often not possible. Alternatively the advisor may find himself charged with the care of an artistic individual who, like Sean Ryder,⁹³ bluntly refuses, for what ever reason, to become involved with the details of business matters. In that case the advisor is only able to act in what he believes to be his client's best interests. In the case of Ryder it may be that the advisor was misled by the outcome of earlier cases and through assumptions about the operation of contract law.

He inadvertently waived his client's rights against the contract by insisting on deploying one particular term of it. The singer, Ryder, seems to have had little or no input to the operation of his own contract with his managers beyond that of continuing to turn up and sing where and when he was told. The advisor acted not only as solicitor but also as:

*monitor and spokesman . . . fulfilled a quasi managerial role, kept his views about the enforceability of the management agreement to himself because he adjudged it to be in the defendant's best interests that the plaintiffs should continue to manage him. . .*⁹⁴

Yet clearly it was the singer rather than the advisor who was held to account. The event of the Shaun Ryder⁹⁵ case may quash that school of thought which suggests that progress over time has developed a strain of vicarious undue influence.⁹⁶ This would have had the potential to take the scope of the doctrines of *restraint of trade* or *undue influence* beyond the contract and might have made the advisory party more directly accountable however well intended his actions.

Where there is an allegation of undue influence, without clarity through future case-law it is uncertain whether the undue influencer need not be a party to the contract, provided that the contract itself can be shown to be onerous and one sided in court. The cause of this expectation is that, in *Barclays Bank v O'Brien/CIBC Mortgages plc v Pitt*,⁹⁷ Lord Browne-Wilkinson has sought to reinstate the position of Public Policy in this area of legal reasoning as well as the principle of relationships of confidence. These are terms that Lord Scarman presumably felt to be over emotive as he labelled them as *words and phrases* leading to *misinterpretation* of facts.⁹⁸ In a move away from Lord Scarman's directive that the victim of undue influence should prove that he had been victimised, Lord Browne-Wilkinson held that the *fiduciary* has a duty *to establish affirmatively that the transaction was a fair one*. The reason for this turn in placing the onus of proof seems to be the inclusion of third party bystanders in the act of influence. This goes toward clarifying the scope of the duty of the fiduciary, he must ensure that his charge enters the contract freely, and is encouraged to take good *independent* advice, free from pressure or interference. Otherwise it is questionable whether there can be said to be an Agreement between the principals to the contract, therefore no contract *per se*. This

whole concept could make contracting in the music industry difficult as the potential to identify closely aligned, well meaning (or otherwise) third party influencers is high.

Invariably, in the bank cases surrounding *Barclays Bank v O'Brien/CIBC Mortgages plc v Pitt*,⁹⁹ where this concept was initiated, the person who has fallen under influence to enter into an imprudent transaction has been a wife, and the key influencer has been her husband. It is a simple analogy to liken Sean Ryder's relationship with his *monitor, spokesman, advisor, lawyer* with that relationship of husband over wife. In these banking cases, the representative of the bank is left, according to Browne-Wilkinson, with the onus of proving that he had not failed in taking *reasonable* steps to ensure that the wife *had adequate understanding of the nature and effect of the transaction and that the transaction was a true and informed one*. Gibbs CJ. reiterated the point in *Commercial Bank of Australia Ltd. v Amadio*¹⁰⁰

. . . of course, the bank and the respondents did not meet on equal terms but that circumstance alone does not call for the intervention of equity . . . A transaction will be unconscionable within the meaning of the relevant equitable principles only if the party seeking to enforce the transaction has taken unfair advantage of his own superior bargaining position, or of the position of disadvantage in which the other party was placed.

For whatever reason the Managers in the Ryder case side-stepped the advisor altogether and obtained Sean's signature to their own version of a contractual agreement, ignoring the advisors express amendments, and they were able to do this because the singer spend a great majority of his time under the mind dimming influence of certain drugs. Initially this is a clear case of undue influence on the part of the managers toward the singer. However, and as stated above, the advisor waived the singer's rights to avoid the contract due to undue influence and what is not clear is why the advisor himself did not become a third-party undue influencer in the eyes of the law as in the Browne-Wilkinson bank cases. Of course this could have lead to unjust law as it is easy to speculate that the managers of Sean Ryder would have had little or no charge over the power he allowed his lawyer. They would have had no mechanism to challenge whether the advice given to Sean, or rather the decisions and actions of the solicitor

carried out on Sean's behalf, were in the best interests of the contract as a whole or simply biased decision making done due to Sean's business abstinence. If the law were to develop the course of third-party undue influencer beyond the bank cases where it has brought justice, this could be interpreted to mean that not only an artists employed advisor, but also his wife (husband), mother, father, or other close relation or companion could be in the position of catalyst, triggering the circumstances under which the music industry executive carries the full responsibility of ensuring that the artist has not allowed himself to become blinkered. It must be recognised that, at the outset of many young artists' careers, it is often the wife (husband), mother, father, other relation or companion who enthusiastically plays the role of pseudo-manager or advisor, vigorously encouraging progress towards that all important 'contract' and attempts to protect their artist thereafter. Thus it is open for the artist to maintain his focus on 'art' and become shy of 'business'. That is the nature of the classes involved.

The question must then be asked: are there instances where music industry contract cases should be dissuaded from calling on the equitable doctrine of undue influence in contractual disputes? It is felt here that the potential course of events described above is enough to support the conclusion that undue influence, like restraint of trade¹⁰¹ is an area of law which is in danger of being distorted rather than properly developed and that these classes of case should spark a fresh development more attuned to their (and society's) needs.

Furthermore, *Panayioutou v Sony*¹⁰² demonstrates, perhaps even more clearly than the previously discussed case, that advisors in the music industry may not be classed as *independent* at all. The plaintiff, George Michael's lawyer, Tony Russell and his Manager, Rob Kahane, frequently spoke for and acted on George's behalf in negotiations and meetings. Often withholding critical information from George and others who were involved in the course of his business.¹⁰³ It is felt here that these individuals became more intimate to the contractual relationship of which George Michael and Sony Music were principals. In accordance with item 2:5:1 and 2:5:2 at page it is felt here that the intrinsic nature of these third parties should be recognised at law incorporating their play into the long-term contractual relationship, both supporting

their right to gain and upholding the degree to which they own liability in that relationship.

END NOTES

-
- ⁷⁸ *Evans v Llewellyn* (1787) 1 Cox CC 333 and approved in numerous cases including *Lloyds Bank v Bundy* [1975] Q.B. 326 at 337
- ⁷⁹ *Bank of Credit & Commerce International S.A. v Aboody* [1990] 1 Q.B. 923
- ⁸⁰ (1866) L.R. 2 Ch. App 53 at 60
- ⁸¹ *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816; *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901
- ⁸² Established in *Gore v Gibson* (1843) 13 M & W 623
- ⁸³ Established in *Matthews v Baxter* (1873) L.R. 8 Ex. 132
- ⁸⁴ Friedman L.M.; *Contract Law in America, A Social and Economic Case Study*, The University of Wisconsin Press, Madison and Milwaukee; 1965
- ⁸⁵ (1913); 153 Wis. 583; 142 NW 264
- ⁸⁶ See discussion on *Artistic Characteristics* p 120
- ⁸⁷ - or of Robbie William when he alleged restraint of trade and likewise George Michael, both detailed post.
- ⁸⁸ See Mansfield's opinions as per Atiyah at note 210
- ⁸⁹ *Lloyds Bank v Bundy* [1975] Q.B. 326
- ⁹⁰ For further discussion on this level of duty see undue influence pp 46 para 2
- ⁹¹ [1974] 3 All ER 757 CA. Lord Denning went on to suggest suitable categories for principled unity.
- ⁹² For more discussion on this see pp 77
- ⁹³ *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816; *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901
- ⁹⁴ *ibid.* [1999] New Law Online, Case 2991221901p 3 points 1- 4
- ⁹⁵ *ibid.*
- ⁹⁶ See *Barclays Bank plc v O'Brien* [1994] 1 AC 180; [1993] 4 All ER 417, HL:
- ⁹⁷ *ibid.*
- ⁹⁸ *National Westminster Bank v Morgan* [1985] 1 All ER 821
- ⁹⁹ [1994] 1 AC 180; [1993] 4 All ER 417, HL:
- ¹⁰⁰ (1983) 46 ALR 402 HC at 410
- ¹⁰¹ To be similarly analysed shortly
- ¹⁰² [1994] EMLR 229
- ¹⁰³ See for example *Panayiotou v Sony* [1994] EMLR 229; at p 312 B77 et. Seq. - the behaviour of Tony Russell on behalf of his client; or at p260 A42 and the 283 A142 – the activities of Rob Kahane.

5: Undue Influence How it Has Applied in The Music Industry

The principle of inequality of bargaining power and the doctrine of undue influence are invoked by incidents where there has been an abuse of power or position, generally where one party has invested considerable confidence or trust in the other. Unlike the inequality, undue influence has developed a set of definable rules of application. The question to be addressed here is does the relationship between undue influence and inequality of bargaining power in court stretch the scope of that doctrine beyond what is reasonable? While there are rules about the operation of undue influence, there do not appear to be any strict rules which dictate when inequality of bargaining power has or has not been demonstrated. The suggestion to be made here is that if the parties have to wait for the wisdom of the judge in each case, then, to avoid meeting him at all, they cannot take preventative or remedial action in the conduct of their relationship. While a large proportion of the discussion so far has been drawn from the general ambit of contract law and development, here a focus on the characteristics of the music industry supports the validity of addressing this question. This will be demonstrated by the cases and discussion which now follow. What is to be drawn from these cases in this context is that it is not in question whether it is wrongful for one party to 'steal' away a benefit which rightfully belongs to the other, these cases have chosen to go beyond that matter to examine the core of the relationship itself. However, a pattern of good behaviour is not clearly handed down as a prescription for the parties' (and others') future, but faults in the conduct or formation of these relationships are identified in court, i.e. bad behaviour. Instead of defining and seeking a way to lay out a clear path for behavioural reform, the court seems to appoint blame and responsibility for behavioural conduct and then reverts to apportioning damages for chiefly quantifiable losses.

It is felt here that the net result of this is that onlookers and potential future litigants are able to point to the parties post case and believe that there has been a unique instance of bad behaviour from which they themselves are disassociated and from which they learn nothing about themselves. Because the majority of industry knowledge of these cases is gained through the media it is also probable that much of what the judiciary intended to be advisory will be lost.

5:1 The Fleetwood Mac Case

Through the case *Clifford Davis Management v WEA Records Ltd.*¹⁰⁴ [The Fleetwood Mac Case], Lord Denning M.R. made some points that support what is suggested here. Furthermore, discovery through personal interview¹⁰⁵ confirms that while individuals in the music industry are aware of this and other similar cases, the finer points of legal advice and development are lost to them. There is a general assumption that artists are naïve, that members of Fleetwood Mac were particularly naïve and not predisposed to sharp business sense and that ‘management’ personnel are often unconscionable in their dealings. The term unconscionable is not actually the term that is commonly applied by businessmen in this industry, with the exception of specialist lawyers who, naturally, use the term guardedly.

The background to the case is: the writers McVie and Welch had, in 1971 and 1972 respectively, signed publishing agreements with Clifford Davis Management Ltd., the management company of their working band Fleetwood Mac. These publishing agreements had an initial life of five years extendible to ten. Neither writer had entered into full negotiations or taken independent advice. The management agreement between Fleetwood Mac and Clifford Davis was terminated in 1974. When the two writers created songs for the later album “Heroes are Hard to Find”, released by WEA in the US, Clifford Davis Management relied on the 1971/72 contracts to claim interests in the UK release assigned to CBS. As a result Clifford Davis Management obtained an interlocutory injunction against WEA and CBS preventing release in the UK while the validity of the claim was put to question. The case was remedied under the equitable doctrine of undue influence, by which it was claimed that Clifford Davis Management had taken undue advantage of the naiveté and lack of advice taken by McVie and Welch and had driven an unfair bargain, reducing their profits and tying them to the management relationship through their work as writers rather than as performing artists (in which guise the relationship had already ceased).

At appeal Lord Denning M.R. took the opportunity to scrutinise the rationale behind *A Schroeder Music Publishing Co. Ltd. v Macaulay*,¹⁰⁶ furthering the understanding, he felt, of inequality of bargaining power. He found that:

- (a) the length of the period of the agreements, potentially ten years, was unfair, and that the benefits to the composers was minimal.
- (b) that the composer was bound to assign the world-wide copyright in each composition to the publisher, but the publisher had no obligation to do anything with them
- (c) the publisher had the right for six months to reject any new composition without payment
- (d) the publisher had the right to assign the agreement to anyone, the composer had no say in it. The composer had no similar right.

The principles set out in the case *A Schroeder Music Publishing Co. Ltd. v Macaulay*¹⁰⁷ were applied:

- (a) contractual restrictions which appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, must be justified before they can be enforced.
- (b) if one party uses his superior bargaining power to exact terms that are unfairly onerous, or to drive an unconscionable bargain, the courts will relieve the other party of his legal duty to fulfil it.

He then went on to discuss his own recent endeavour to state the terms of inequality of bargaining power in *Lloyds Bank v Bundy*¹⁰⁸ and to strengthen the approval gained via Lord Diplock at *Instone v A Schroeder Co. Ltd.*¹⁰⁹ Lord Denning said:

*Now the question arises: is the court bound to enforce this assignment of copyright at the suit of the publisher alias manager? The agreement is of the same class as the agreement considered by the Court of Appeal in Instone v A Schroeder Co. Ltd. and by the House of Lords only last week.*¹¹⁰ An agreement such as this is not an agreement which is ‘in restraint of trade’ strictly so called. It does not preclude a man from exercising his trade at all. But is an agreement which is ‘restrictive of trade’. . . ¹¹¹

So did active members of the music industry view the progress of the cases *A Schroeder Music Publishing Co. Ltd. v Macaulay*¹¹² and *Clifford Davis Management v WEA Records Ltd.*¹¹³ [The Fleetwood Mac Case] and then amend their ways to avoid future conflict in this area? The answer is a resounding “no”! When faced with this class of

conflict is the course to remedy clear cut and well understood by the contracting parties?
No!

5:2 Gilbert O'Sullivan

1970, eleven years after the Fleetwood Mac Case came *Gilbert O'Sullivan v Management Agency and Music Ltd.*¹¹⁴ Here was a complex affiliation of business confidence and personal trust founded on the artist's relationship with his manager. This dispute was between two plaintiffs: singer/writer Gilbert O'Sullivan plus his own company Gilbert O'Sullivan Ltd. (set up to receive his UK generated incomes) and six defendants: Management Agency Music Ltd; MAM (Music Publishing) Ltd.; Gordon W. Mills; Ebostrial Ltd.; MAM (Records) Ltd. and CBS Inc. O'Sullivan had approached manager Gordon Mills while his early career was failing and trusted Mills to sign him up to the appropriate companies for publishing, recording and distribution purposes as well as personal management. During the time he was signed to these companies and under Mill's care his career became successful, in eight years he realised gross retails sales of more than £14.5 million.

The cause of breakdown in this relationship, and one of the key triggers to O'Sullivan's dissatisfaction was that he held mistaken belief that he had signed into the same class of joint publishing *partnership* as his contemporaries Tom Jones, Englebert Humperdink and the like. He had already made this mistake in his prior agreement with April Publishing and was sophisticated enough to be clear about his commercial desires. At both first instance and at Appeal the courts¹¹⁵ felt that poor characteristics of the relationship were portrayed by O'Sullivan's contention that he never achieved the promised publishing-partnership status. MAM's credibility was brought to question in view of the fact that a publishing-partnership had been discussed between O'Sullivan and MAM and it had been indicated that the desired 50/50 set up would be arranged at some undetermined time in the future, a promise never to be kept if O'Sullivan's version of events is accepted. Eventually the artist/writer refused to sign pertinent documents, notably having taken independent advice on the matter. It must be noted here that artists of such stature can and do command a very lucrative 50/50

remuneration deal from publishing material by taking a directorship in the company which is set up within the publishing agreement itself.

In court the fact that the manager, Gordon Mills, was a substantial shareholder in the first five defendant companies, as well as advisor and manager to O'Sullivan through Management Agency and Music Ltd., was felt, of itself, to be enough to raise a presumption of undue influence against him. But industry custom is ignored in this, as it is not entirely unusual for a publisher to have a hand in management or vice-versa. It is wholly possible that the outcome of the artist's career would have been the same if the publisher, the recorder and the manager had been three people. The point being that the relationship is one that is fiduciary in nature, but three fiduciaries must be just as responsible as one, unless the suggestion is that they counter each other in terms of independent advice?¹¹⁶ Also, compare this case with the court's view of the 'independent' advisor in *Ryder v Nicholl and Another*.¹¹⁷ How far removed does an advisor have to be to be classed as 'independent', conversely, how close to the bargaining process can an 'independent' advisor become involved?

As it was, the success of the complex series of agreements in play largely turned on the incorporation of overseas (tax exempt) banking. This would have caused substantial mystery to those not one hundred percent experienced in such matters, however many heads were involved:

*... Enormous sums of money came pouring in to MAM from all over the world, although where it all came from and what percentage it represented of whose earnings remained a mystery.*¹¹⁸

There can be no question that the relationship between Gilbert O'Sullivan and Gordon Mills was one based on trust and confidence on both parts. At the outset Mills moved O'Sullivan from his bed-sit in Bayswater to a small and attractive bungalow in the grounds of Mill's Surrey mansion. He was provided with £10 per week cash and in addition *all* outgoing expenses were paid by one of the MAM companies. This was not an unusual arrangement, in point of fact, it was noted in court that the £10 weekly sum equalled O'Sullivan's prior weekly earnings as a postal clerk. In addition it must be

realised that he was not restricted from drawing cheques against his royalties although it is understood that he did not withdraw a great deal.¹¹⁹ He was left in this 'Utopia' to write hit after hit, as and when he pleased, until, in 1972, he moved into his own £95,000 home. O'Sullivan seems really to have become disillusioned with the relationship (along with Englebert Humperdink who simply switched management) when Mills became preoccupied with his private zoo in Los Angeles. Lawyers were then employed and spent three years preparing O'Sullivan's case. The lawyers did discover that although some £500,000 pre tax income had been paid to the artist, some £14,500,000 remained outstanding. Steps had been taken by MAM to provide legitimate tax avoidance on behalf of the artist but as the quote above suggests it is difficult with this type of accounting to separate and apportion these kinds of amounts while they are being put to work. It is quite possible to speculate that the outstanding amounts were held away from the artist in order for them to accrue greater mass to his eventual benefit, and nothing more sinister.

The Court of Appeal¹²⁰ felt that the trial judge in the ensuing case had levelled unjustified criticism toward Gordon Mills. The Court ensured that the defendants were allowed remuneration for skills and labour (recognising the nature of the joint venture). Inequality of bargaining power was not brought into play in this case and Fox L.J expressly dismissed restraint of trade:

I should refer to the argument advanced by the plaintiffs that, quite apart from any undue influence, the agreements were wholly void as being in restraint of trade. The fact that the agreements were in restraint of trade does not, in my view, render them void. They are unenforceable . . . Thus in Schroeder Music Publishing v Macaulay the agreement was held to be in restraint of trade Lord Reid said "It must therefore follow that the agreement so far as unperformed is unenforceable". That was also the view of the Court of Appeal . . . Accordingly, I do not think this argument advances the plaintiffs' case.¹²¹

In discussion, while preparing this discourse, both learned colleagues and those involved in preparation for the O'Sullivan v MAM case have suggested that O'Sullivan was lucky in the outcome and that a different perspective on the course of events could have brought about a different outcome in court.

5:3 Evaluating Undue Influence as a Governance Factor to the Industry - The Inclusion of the Principle of Inequality of Bargaining Power and the Cross-over With the Common Law Doctrine of Restraint of Trade

The O'Sullivan case is contemporary with *National Westminster Bank plc v Morgan*.¹²² So it can be said that the view of the House of Lords, at that time, was as expressed by Lord Scarman.¹²³ In short it was that when the relationship between the parties was one which was fiduciary in nature and therefore led the court to the *presumption* of undue influence, then it was necessary for the *plaintiff* to prove manifest disadvantage or victimisation, in order to render that presumption actionable. Lord Scarman called for the destruction of any idea that that a banker, in *National Westminster Bank plc v Morgan*, when explaining the nature of a proposed transaction, automatically lays himself open to a charge of undue influence.¹²⁴ He felt that he had support from Sir Eric Sachs in the view that:

*. . . the relationships which may develop a dominating influence of one over another are infinitely various. . . There is no substitute in this branch of law for a 'meticulous examination of the facts'.*¹²⁵

This matches the expectation of the music industry manager/publisher/record company executive. Gordon Mills cannot have guessed that in manipulating for Gilbert O'Sullivan to develop into a wealthy and famous entity (as had Tom Jones for example) that he was *victimising* him. According to Lord Scarman evidence of *victimisation* was necessary and that is what the resolve to the case suggests to the business onlooker, and that is why it serves no purpose in advising other music industry fiduciaries. At that time there prevailed an assumption that any artist would be naïve in respect of business matters, a view which the judiciary appear to share:

*It is, I think, clear that O'Sullivan, who was at all material times a young man with no business experience, . . .*¹²⁶

It was, broadly speaking, an easy sell for the artist to persuade the court of *victimisation*.

None of this goes any way toward providing management of expectation or governance of behavioural patterns for contracting parties. Managers, publishers and recording

company executives cannot, it seems, learn from these cases that they have a particular fiduciary relationship with their artists which involves a duty of care over advice and information beyond that which they already believe they provide. This in itself seems one sided as it assumes some form of weakness, idiocy or incapacity on the part of the complainant. However, the current legal view¹²⁷ puts all the onus of responsibility on the other side, as stated by Lord Browne-Wilkinson in *CIBC Mortgages plc v Pitt*¹²⁸

. . . the law imposes a heavy duty on fiduciaries to show the righteousness of the transactions they enter into with those to whom they owe [such] duties.

The term *inequality of bargaining power* is not, as can be seen in these cases, interchangeable with *undue influence*, nor had the court, during these decades, developed the habit of applying the term as suggested by Lord Denning. Whether actionable undue influence is best confirmed by proof of victimisation on the one part or by disproof of onerous behaviour on the other is a question largely academic in nature. So it is felt that Lord Denning was correct in his assertion that an assertion of inequality of bargaining power, hitherto most often a common law assertion, raised in connection with restraint of trade in music industry cases, would go further toward drawing a clearer scenario for analysis in court and for the public perception of what was wrong about the parties' conduct post case. An action of this nature could be clearly guided by the advice of Gibbs CJ. As given at page 58 above, where it is made clear that it is not the mere bargaining power of the parties, but the taking of an unfair advantage which will lead to liability.

It has already been suggested that none of these legal concepts are new. A summary of the intention of Lord Denning and the reasoning of Lord Browne-Wilkinson or Gibbs CJ. can be obtained through Adams J. in *Harris v Richardson* (1877)¹²⁹

It sufficiently appears that the principle on which equity originally proceeded to set aside such transactions was for the protection of family property; but this principle being once established the court extended its aid to all cases in which the parties have not met upon equal terms . . . in the case of the "expectant heir", or of persons under pressure with inadequate protection, and in the case of dealings with uneducated ignorant persons,¹³⁰ the burden of showing the

fairness of the transaction is thrown upon the person who seeks to obtain the benefit of the contract.

While artists are prepared to rush into signing the contract which they believe will realise their dreams;

*I was so overwhelmed I would have done whatever they told me in order for them to make me a pop star.*¹³¹

it is certain that many publishers, manager and record company executives do not recognise their position as being one from which they can be held out to be *undue influencers* (in lay terms bullies) in the terms of the law. And while Lord Scarman's perspective, that the facts must be meticulously examined, is unarguably valid and largely agreed with here, the fact remains that law is one of society's greatest advisors. Classes of law are recognised and adhered to by classes of society because they are able to understand and relate to what the law suggests. If a music industry executive ever turns his mind to the matter at all, the chances are, at present, he would misinterpret and believe the expression 'undue influence' to represent a form of deviant or 'bad' behaviour, *even*, given his industry's background, analogous with blatant attempts at fraud - a far worse behavioural trait than he would recognise in himself when it comes to forging relationships with artists.¹³² If this is so, then the reason that the legal rationale of the cases cited above are misunderstood or ignored each time, is because the legal rules and assertion are presented in such a way that the applicable class(es) cannot make sense of them. Unconscionable construction of a contractual relationship and inequality of bargaining power both seem to be governing principles which industry Personnel might more easily have understood and adopted.

A recent and most blatant example is that of *Nicholls and Another v Ryder*,¹³³ already discussed throughout this discourse. The event of this case can only serve to prove that no lesson was learned within in the industry via the judicial reasoning and declarations of prior cases. To add to this the law is made no clearer to potential recipients in that it was remedied in court through the introduction of the concept of estoppel and/or waiver. On the matter of undue influence the very fact that the new managers had the artist sign his contract with them whilst he was under the influence of drugs, combined with the

fact that the document he signed was not remedied to comply with his advisor's recommendations and that he had no means of referring to his advisor's recommendations or considering them before he signed, must add up to at least undue influence if not a charge more sinister. Furthermore, the managers had the artist sing to a record company for which they were employees. By O'Sullivan case standards alone undue influence was very much at play here. Furthermore, the court, in this instance, failed to question the 'independence' of the advisor to Ryder, given that it was decided that he was acting in a *quasi managerial role* as well as advisory. Instead Ryder himself was accredited with the knowledge and capability of the advisor as if the two were one and the same person at law. Sean Ryder was clearly not making any decisions or forming any opinions for himself.

5:4 The Stone Roses Case

It is clear that progress of time has allowed the judiciary, in the absence of statutory intervention, to consider the relationship between the bargaining process itself and the consequent contractual terms. Also, somewhat ironically, that this course of consideration is enabled by the continuing appearance in court of artists claiming that their contracts are in either in restraint of trade or brought about by undue influence – or both. On the matter of equality of bargaining power in *Silvertone Records Ltd. v Mountfield and Others*¹³⁴ Humphries J. observed:

The Stone Roses themselves were not highly educated, had no legal experience, little or no business experience and were very much under the influence of Mr. Evans. They had little or no income. Some indeed I think were on social security.

and went on. . .

I find that as between the parties negotiating and entering into the agreement there was immense inequality of bargaining power, negotiating ability, understanding and representation. It is, however, possible even if one person has superior knowledge and bargaining power for a fair agreement to be reached. Not everyone who is in a position to do so misuses his power to take advantage of the weaker party. . .

The record company in this case, Silvertone Records were assigned the contract via Zomba Production Ltd. while Zomba Music Publishing kept the publishing rights on the band's material. Interestingly, by comparison with the Schroeder contract, these later publishing contracts normally have a 'reasonable endeavours' clause, as did this one. Furthermore, Silvertone Records claimed that the potential for perpetuity in the unlimited options clauses in this particular contract was the result of a drafting error. What is more the recording contract and the publishing contract provided by Zomba could only be signed as a joint package. Not only does this reflect the complex series of relationships displayed in *O'Sullivan v MAM*¹³⁵ but it also resembles the issues raised in the *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd*¹³⁶ case. These factors would suggest lack of adequate independent advice on the part of the artists. Humphries J. considered that:

*... the investigation of reasonableness of bargains made by persons not under a disability, is only undertaken in a limited number of circumstances, so that in this case if the contract is not properly called a contract in restraint of trade further investigation of the term does not arise*¹³⁷

However, the contract dictated that Zomba/Silvertone would have the right to exploit the Masters (recordings) of The Stone Roses in perpetuity and that they could exercise the right to discontinue or recommence the production and exploitation of the band's records at their discretion.¹³⁸ This is not a covenant in restraint of trade strictly so called but is restrictive of the artist's liberty to expect progressive career or sales development as what would be released, and when it would be released was forever at the whim of Zomba. The contract also contained a covenant that The Stone Roses would not perform for the manufacture or release of records any material embodied within the Zomba Masters for a period of ten years post contract, nor any material during the life of the contract for recording by any other person, firm or company (even if it was material which Silvertone/Zomba did not want to exploit).¹³⁹ These elements combined with the joint package deal in the publishing assignment were sufficient for Humphries J. to find as a matter of construction that the company had it within their means to prevent the band from trading or earning a living for several years and as such the contracts were in restraint.

END NOTES

- ¹⁰⁴ *Clifford Davis Management v WEA Records Ltd* [1974] 3 All ER 616 HL
- ¹⁰⁵ Interviews have been carried out with Agents, Managers, Record Company Executives, Publishing Executives and Artists none of whom wished to be named in connection with specific quotes.
- ¹⁰⁶ [1974] 3 All ER 616 see discussion post
- ¹⁰⁷ *ibid.*
- ¹⁰⁸ [1974] 3 All ER 757 at 765; 3 WLR 501 at 508/509
- ¹⁰⁹ [1974] QBD 1 All ER 171 at 177 d-f
- ¹¹⁰ Reference to *A Schroeder Music Publishing Co. Ltd. v. Macaulay* [1974] 3 All ER 616 (Appeal following *Instone*)
- ¹¹¹ [1975] 1 All ER 237 at 240a. Own emphasis. The importance of this distinction of *restraint of trade* shall be made clear post
- ¹¹² [1974] 3 All ER 616
- ¹¹³ *ibid.*
- ¹¹⁴ *O'Sullivan v Management Agency and Music Ltd* [1985] Q.B. 428
- ¹¹⁵ [1985] 3 All ER 351 at 356 f to 357 e
- ¹¹⁶ For the validity of advisors remote from the contracts see *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901
- ¹¹⁷ see note on this matter at the end para. 2, page 70 post
- ¹¹⁸ Tremlett G.; *Rock Gold*; Unwin Hayman Ltd.; 1990;
- ¹¹⁹ Per Dunn LJ: [1985] 3 All ER 351 at 355f . . . *although his requirements were modest* . . .
- ¹²⁰ plus expert parties involved in this case, interviewed for this study, but choosing to remain un-quoted.
- ¹²¹ [1985] 3 All ER 351 at 373j
- ¹²² [1985] 1 All ER 417
- ¹²³ *ibid.* at 826h to 827h
- ¹²⁴ *ibid.* 829g
- ¹²⁵ *ibid.* 831b
- ¹²⁶ [1985] 3 All ER 351 at 369e
- ¹²⁷ See *Barclays Bank plc v O'Brien* [1994] discussion p 57
- ¹²⁸ [1993] 4 All ER 433 at 439j: See also *Barclays Bank v O'Brien/CIBC Mortgages plc v Pitt* [1994] 1 AC 180; [1993] 4 All ER 417, HL
- ¹²⁹ (1877) 2 AC 814 HL.
- ¹³⁰ For another example see the description of The Stone Roses give on page 70 below
- ¹³¹ George Michael; The Sunday Times; *Profile*; October 24, 1993
- ¹³² See character diagrams post 120 and at Appendix 6. The relationship between the individuals is, in the main, curiously passionate.
- ¹³³ *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816: *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901
- ¹³⁴ [1993] EMLR 152 at 161 – 163 own emphasis
- ¹³⁵ [1985] 3 All ER 351
- ¹³⁶ [1965] 2 All ER 933; [1966] 1 All ER 725 [1967] 1 All ER 725 CA; [1968] AC 269 HL as discussed from page 73 below
- ¹³⁷ *Silvertone Records Ltd. v Mountfield and Others* [1993] EMLR 152 at 159
- ¹³⁸ *ibid.* at 160: Clause 4:1
- ¹³⁹ *ibid.* p161 Clause 6.2

6: The Initiation of The Application of the Doctrine of Restraint of Trade, Leading up to *A Schroeder Music Publishing Co. Ltd. v Macaulay* [1974]

The next point expressed will be that it is an unsatisfactory, confusing and inexpedient development in contract law to have allowed the contractual doctrine of restraint of trade to extend to bring remedy to disputes raised during the life of the contract. The difficulties caused by this development have made it something of a hardship to explain exactly why parties continue to turn towards restraint of trade for remedy. Before proceeding with that point in full, it is felt pertinent to refer to Brownsword. He may have gone some way toward explaining how this, somewhat paradoxical, development appears to be an acceptable course.¹⁴⁰ He states that effective contractual co-operation must include voluntary *restraint* from certain actions of self-interest.¹⁴¹ From this idea, cases such as *A Schroeder Music Publishing Co. Ltd. v Macaulay*,¹⁴² can be said to display misguided expectations in the spirit of community co-operation, as the Schroeders could very reasonably have expected their writers to restrain their ambitions and work in co-operation even without the need for written standard form restrictions. If the party believed that such restrictions were voluntary (almost like fidelity in a 'good' marriage) then how can he think that his contract is void for being in restraint, sterilising capacity etc. In his mind the paper contract may well reflect his expectations for the voluntary behaviour of the other and no more. As discussed later, it might be natural for a publishing house or recording company to assume (following their huge investment of time, expertise and funds) that the artist willingly gives up the liberty to chop and change allegiance whenever the fancy takes him. On a daily basis, until a dispute arises, there is a great deal of community spirit in music industry contractual relationships, but it is definitely not all driven by altruism.¹⁴³

So, 'Why do aggrieved parties from the music industry attempt to execute charges of restraint of trade *intra-contract*?' The answer lies in the expansion of the scope of that doctrine following the case of *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd*.¹⁴⁴ It is suggested here that that case does not truthfully represent development *per se*, but rather opened the gates for digression on an *ad hoc* basis. The difficulty of interpreting how the doctrine could become operable in the circumstances surrounding

*Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd.*¹⁴⁵ is documented in the comments made in the House of Lords at the time:

*I have found it no easy task to determine how far principles developed for the original categories have been or should be extended.*¹⁴⁶

. . . or

. . . depends to some extent on two doctrines denied in the court below.

*Restraint of trade does not apply during a contract . . .*¹⁴⁷

Restrictions in development of common law are not advocated here, but it is felt that the traditional purposefulness of the doctrine has been diffused where it has been applied *during a contract*. It is believed that the clarity and effectiveness of a set of rules has been diluted so that the substance of this law, when it is later invoked, is thin and difficult to manage. This in turn leads to mis-managed contractual behaviour followed by misdirected litigation and a legal outcome which is difficult to assess. Lord Pearce was cautious enough to note that the wider the doctrine of restraint of trade, the more scope there will be for “*. . . chicanery and delaying tactics*”¹⁴⁸ are a pre-requisite to the application of this strain of restraint of trade. Lord Wilberforce, having analysed the matter, came to the apposite conclusion that the doctrine of restraint of trade is *ambiguous*. He suggested :

*The common law has often (if sometimes unconsciously) thrived on ambiguity and it would be mistaken, even if it were possible, to try to crystallise the rules of this, or any, aspect of public policy into neat propositions.*¹⁴⁹

This statement is, surely, so unsatisfactorily vague that, if it stopped there, it would be hard to see how any litigant or lawyer would ever manage to raise the principle again, or how any judge managed to interpret the intention at law:

*The doctrine of restraint of trade is one to be applied to factual situations with a broad and flexible rule of reason . . . how can such contracts be identified? No exhaustive test can be stated - probably no precise, non-exhaustive test . . .*¹⁵⁰

The governing principle which seems to be at play in their lordships minds here, is that equity will not suffer a wrong to go without remedy, *vis-à-vis* the principle and somewhat broader protective intention of public policy decisions. Fair enough, but restraint of trade is a *common law* doctrine.¹⁵¹ Also, common law surely does not ‘thrive on ambiguity’? The quality of having more than one meaning should generally

prompt the court to lengthy and critical discourse resulting in a firm proclamation of precisely what it does mean, and of which words will, and which words will not, satisfy.

Setting the question of ambiguity aside (for it is one of great depth sufficient for a detailed study in its own right) and returning to developments via the case of *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd.*¹⁵² what have been extracted and brought forward as principles of the law concerning restraint of trade are these:

- (1) The super-added obligation invoked by a solus agreement may, if onerous or sterilising, be enough to constitute good cause in restraint of trade¹⁵³
- (2) That where one party has no alternative but to enter into a bargain with a party of far greater financial or other commercial strength, then restrictions operated by that bargain must be proven to be reasonable or will be deemed to be in restraint of trade¹⁵⁴
- (3) That even when the dispute arises during the currency of the contract, the principles at (1) and (2) are capable of finding remedy under the doctrine of restraint of trade.¹⁵⁵

Prima facie there is nothing onerously complex about these principles, but an examination of the reaction in subsequent hearings, where the precedent was required, exposes the difficulties. For example, within the course of the benchmark music industry case *Instone v A Schroeder Co. Ltd.*¹⁵⁶ Russell L.J. commented:

*We have been rather puzzled by an approach to restrictions on trade during the currency of exclusive contracts which appear to deny them the quality of restraint of trade . . .*¹⁵⁷

And during the same case at appeal Lord Reid added:

*Normally the doctrine of restraint of trade has no application to such restrictions*¹⁵⁸

and in a later case, with reference to *A Schroeder Music Publishing Co. Ltd. v Macaulay*, Lord Denning M.R. gave the view:

*An agreement such as this is not an agreement which is 'in restraint of trade' strictly so called . . .*¹⁵⁹

This passage commenced with the question 'Why do members of the music industry attempt to execute charges of restraint of trade *intra-contract*?'. The simplistic answer is that they are following other music industry in the true nature of the principle of precedent. However, the point that this sequence is intended to demonstrate in the following passages, is that later litigants have remained ignorant of that which so puzzled the judiciary, and this ignorance in itself illustrates that badly formed precedent, even where it is merely *persuasive*, gives rise not only to difficult law but also to bad contractual formation since nothing can be learned from a muddle at law. Later it will be seen that the artists George Michael and Shaun Ryder misguidedly relied on restraint of trade at great cost. Evidence throughout this discussion suggests that one side (generally an individual, the artist) will use this extended strain of restraint of trade as a threat to get his own way.¹⁶⁰ The other side (generally corporate bodies) cannot foresee any fault in their own practices or amend those practices because the law now presents them with a puzzle.¹⁶¹ The desired effect of the *restraining* clause is to create exclusivity during the relationship. This would otherwise be described as a *term of fidelity*. This exclusivity is an absolute requirement, it is the intention behind the contract, it is the very core of the relationship and it is precisely what both parties crave before they meet. Of course it is one-sided.

In general the corporation (record company, publisher, management, etc.) needs to have several successful artists or writers working under its auspices or else (*nondum auspiciu*) its kudos in the industry will remain limited. The power of that kudos is one of the prime elements for which the individual (artist, writer, etc.) is bargaining. However, the costs of manufacturing, advertising and promotion to achieve success in this industry are high. So, in return for industry skill and investment based on faith in nothing more than artistic talent, the corporation requires a commitment, exclusivity. Thus the company ensures that the relationship is not interrupted while both parties net their *agreed* percentages of the anticipated returns. However, it is very often the details of percentage shares that need renegotiation rather than the duration of exclusivity.

As a result of the unruly development in this area of contractual behaviour, strategy on the part of advisory lawyers in this industry has become opportunist to say the least. In interview one lawyer has admitted:

*. . . when I set my stall out, and comment on their [the artists'] agreement generally (often in writing) I might well tell them that their contract is manifestly unfair. Then, in the future, when my client is, hopefully, successful and a fair renegotiation does not take place there is arguably an option to say 'this is not enforceable, its an unreasonable restraint of trade' and then the threatened 'walk out' exists*¹⁶²

This type of contract then, represents industry standard. The practice described above is derived from the effect and post-hearing interpretation of the music industry case: *A Schroeder Music Publishing Co. Ltd. v Macaulay*¹⁶³ and others which followed suit.

How then, turning on the principle developed in *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd.*,¹⁶⁴ was the doctrine of restraint of trade applied in *A Schroeder Music Publishing Co. Ltd. v Macaulay*?¹⁶⁵ In his examination of *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd.* Heydon¹⁶⁶ suggests, contrary to the feeling held here, that the House of Lords was correct in rejecting the traditional limitations on the doctrine of restraint of trade. He describes the doctrine as one intended to remedy the "fettering of an existing freedom". From this perspective, he draws attention to the test proposed by Lord Reid:

*Restraint of trade appears to me to imply that a man contracts to give up some freedom which otherwise he would have had.*¹⁶⁷

In the *Esso* case the freedom under question was the freedom to trade whatever brand of petrol or any other goods, at whatever prices the Harpers saw fit. They gave this up to enter a solus agreement with Esso. On analysis, this test proves too wide because it is dependent upon the freedom being in place before and at the time of the solus agreement. It would not be hard, if that was all that the test amounted to, for subsequent solus supply dealers to incorporate a pre-requisite that the property or material over

which freedom is exercised be transferred before the solus agreement is activated. That would, it is believed here, be a true display of inequality of bargaining power.

If this pre-fidelity freedom test had been applied in *A Schroeder Music Publishing Co. Ltd. v Macaulay*¹⁶⁸ it would probably have rendered every artist or writer's contract immediately *voidable*. It is axiomatic to a contract of exclusivity that the artist or writer gives up his freedom to record or sell one song at a time, which is exactly what Tony Macaulay did. It must be noted here that it is quite usual, before any long-term contract is offered by any company, that creative competence will be established by artists or writers through a period of trading here-and-there, selling one-off songs or albums which represent their potential and confirm their style and technique. Thus the potential for value they would bring to a long-term commitment is established.

Heydon, quite rightly, dismisses the Lord Reid test and turns to that framed by Lord Pearce which is a test to find whether there has been *sterilisation of capacity*. As this test addresses the degree to which the complainant is adversely affected by living with the terms of the contract, it is more credible. It was this rationale which was applied in the case of *A Schroeder Music Publishing Co. Ltd. v Macaulay*.¹⁶⁹ Indeed it is the substantial link between the two cases. Lord Pearce explained that:

*The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract, viewed as a whole, is directed towards the absorption of the parties' services and not their sterilisation.*¹⁷⁰

So, sterilisation of capacity in the instance of a petrol retailer, may occur where the supplier lowers the price to other retailers within the territory diverting and reducing *the retailer's* trade, while holding him to a (now) disproportionately high price by the terms of the formal agreement. The loss of business, coupled with an obligation to trade solely in product from the one supplier, will soon damage the retailer's profit. He is contractually bound to bear the resultant loss until he can no longer afford to trade at all.

The introduction to the courts of the concept of *sterilisation* so far as performing artists are concerned is, perhaps, best illustrated by the case *Warner Bros. Picture Inc. v*

Nelson.¹⁷¹ Here the court, on the matter of the effect of industry-wide restraint clauses, considered whether Ms. Davis could, if she needed to earn other monies, take up employment outside the field of acting, without breaching Warner's terms.

6:1 A Closer Look at *A Schroeder Music Publishing Co. Ltd. v Macaulay*

What must be made clear at this juncture is that it is not the fairness or otherwise of the Macaulay/Schroeder contract which is to be questioned here, it is the effectiveness for the contracting community of this development in the doctrine of restraint of trade. The intention here is to provide a view of the approaches attitudes and intentions of the judiciary, so far as these can be deduced. Furthermore the judicial and legal effort which has been expended on this, and subsequent similar cases, serves to illustrate the high cost or investment to which the industry remains vulnerable because cases begging the question of restraint of trade continue to occur over twenty years after *A Schroeder Music Publishing Co. Ltd. v Macaulay*.¹⁷²

By contrast to the *Esso* case, it was suggested in *A Schroeder Music Publishing Co. Ltd. v Macaulay* that sterilisation of capacity occurred because the publishing company was under no specific obligation to invest in, or promote, the writer's songs to any measurable degree, while the writer was tied to the publisher for a minimum of five, probably ten, years:

*The respondent is bound to assign to the appellants during a long period the fruits of his musical talent. But what are the appellants bound to do with these fruits? Under the contract nothing . . . As has been said they may put them in a drawer and leave them there . . .*¹⁷³

6:1:1 Lord Reid

From this juncture there seems to be a void in understanding between the judiciary and the business they are addressing. If Lord Reid was merely pointing out that the terms suggest that the publisher *could* so sterilise a writer's capacity to earn, then that would be fair comment. However if he genuinely supposed that a publisher *would* do that then he is missing the point and misinterpreting the *intention* of the contract on both parts.

He is not making that suggestion, so it is difficult to understand what are the grounds for this passage of deliberation? Lord Reid speculated a great deal over whether a publishing (or equally here a recording) company might be tempted to pursue greater commercial gain from channelling investment to a different writer to the neglect of the one in hand. But he did not expand his reasoning to consider whether this would (surely naturally) result in the negation of options clauses, and thus reduce the term of obligation to its minimum duration anyway. If an artist or writer produces such poor works that the company cannot profit from them, then it is doubted here whether there would be any argument over letting the individual go. Overall Lord Reid seems to have set in his mind that the agreement was not a fair one. This is largely derived from his assertions that the full extent and meaning of the terms were *not very clear*¹⁷⁴ coupled with the generally speculative nature of his interpretation of the effects of the agreement. An attempt had been made to invoke the doctrine of *good faith* of which Lord Reid took a very narrow perspective and his comment could be read as contradictory to his prior argument in respect of the possibility of publisher refusing to publish. He said:

*It was argued that there must be read into this agreement an obligation on the part of the publisher to act in good faith. I take that to mean that he would be in breach of conduct if by reason of some oblique or malicious motive refrained from publishing work which he would otherwise have published. I very much doubt this but even if it were so it would make little difference. Such a case would seldom occur and then it would be difficult to prove.*¹⁷⁵

Throughout the case no question is raised in their lordships minds over the obligations in good faith which must be on the writer [or artist in other cases]. Neither is the question raised directly of the presence of bad faith. There is an opportunity in this case to explore the attitude of the publishing company in respect of improper accounting toward Macaulay. However the court found that moves were in hand to correct accounting procedures after the error became apparent to the Schroeders and the analysis that lack of actual bad faith might show an intention of good faith in the relationship.¹⁷⁶

An impression formed here is that in respect of this case there appears to be an assumption by the judiciary that the writer is busy creating suitable songs, in a timely manner and that his general behaviour is beyond reproach. This assumption is largely footed in the image of the writer as a *young* and *inexperienced* man,¹⁷⁷ which seems to have been interpreted as one bearing wholesome attributes and clean ambitions. It seems that Lord Reid did not give time to consider the possibility that the writer Macaulay might have been able to discuss or re-negotiate the contract. He accepts from the facts that the writer is trapped without recourse.¹⁷⁸ No thought is expended on the known fact that he came to this contract knowing the industry well enough to have ambitions toward becoming a record producer,¹⁷⁹ potentially a much more powerful industry position to attain, or that he did negotiate some of the terms of this agreement for himself at the outset.¹⁸⁰ He had had other, one-off publishing agreements in the past, had worked in collaboration with at least one other writer and was now, in the 1970's, making an income far in excess of £5,000 per year in order to trigger the continuing life of the contract.¹⁸¹ So far as can be understood he was not an idiot and he was not starving in a garret. Furthermore, notwithstanding that he had written for Elvis Presley and had at least one charted single in the UK,¹⁸² his writing career was not so high profile in nature as to suggest that he would be precluded from pursuing other income generating activities if he so wished.¹⁸³

The idea engendered by case reports and surrounding reportage is that the quantity and presentation of standard form clauses defeats the ability of individuals like Macaulay to interpret whether they fully represent intentions and expectations. This would, in turn, beg the suggestion that writers and artists come to the source of the contract, in this case the publisher, with an attitude of either trust or ignorance. They certainly would not *want* to doubt that the source is offering what would amount to the first steps to long-term success, but many of them may be subconsciously deceitful in that they expect that success to bring the power to rewrite the contract to their own specifications. In opposition to Lord Reid and his contemporaries' view of artists this aspersion could lead to the view that artists habitually form contracts in bad faith, albeit unwittingly so.

6:1:2 Lord Diplock

However, presupposing good faith on the part of the writer and finding it to be analogous with naiveté, and because this contract in its paper form was based on A. Schroeder Music Publishing Company's standard form, albeit with adjustments, Lord Diplock saw the 'standard form' as core to the problem. He found that the doctrine of restraint of trade invoked protection of public interests (public policy) and that the presence of the standard form could suggest to him inequality of bargaining power at play.¹⁸⁴ As Trebilcock¹⁸⁵ points out Lord Diplock, at least exercised caution enough to state that the mere possibility of take-it-or-leave-it transactions arising from standard form contracts raises:

*"... no presumption that they use it to drive an unconscionable bargain... [but that] special vigilance on the part of the court was called for to see that they had not".*¹⁸⁶

It is assured that Lord Diplock was mindful of some of the potential repercussions of developing the notion of unequal bargaining in these circumstances. For it would have been absurd if as a result all standard form contracts had become voidable due to a diversity of market-place status amongst the parties. Very many standard forms represent a contract binding a commercially small trader (supplier, parts manufacturer, buyer, independent retailer, craftsman, artist etc) to a financial giant. In addition to the present point Trebilcock adds:

*... the assumptions underlying Lord Diplock's analysis of the use of standard form contracts is fallacious... the reason why such contracts are used is to facilitate the conduct of trade or, in economic terms, to reduce transaction costs.*¹⁸⁷

In other words it is not to be supposed that the standard form in this industry is necessarily a tool of deception utilised by the commercial entity against the individual. The somewhat innocent or naïve interpretation of the persona of these artists could be the foundation for an argument that they require a similar degree of protection from standard form contracts, as do the general public in their guise as consumers. In its capacity as a protective authority Parliament has responded to public need by enacting a variety of consumer protection law.¹⁸⁸ So far the available legislation has not encroached on this particular common law territory of contracts for services, but, to

utilise the term of Lord Kenyon,¹⁸⁹ it seems probable that artists and other music industry entities are *not equal to protecting themselves*.

In general recording, management, agency or publishing agreements do not represent unusual terms, the terms have grown up in this industry over more than fifty years. Neither, in essence, do the demands of duration and exclusivity exceed that which it is reasonable for an investor to expect in exchange for his commitment to the partnership.¹⁹⁰ The agreements are however, lengthy, and accuracy necessitates complexity in their presentation. To have to create each one afresh would be an onerous requirement in itself. Lord Diplock did not intend to reproach the general act of standard form contracting, it was that he imagined that one party had no say at all in the content (take-it-or-leave-it) and he opined that the industry had not been active for enough years for the standard terms to have been honed to fairness by stronger forebears. In addition, as he stated himself¹⁹¹ it is not actually possible to pin down a publisher (or record company) to give a *promise* of any given degree of commercial success.

6:2 The Standard Form: Clauses From The Schroeder Contract

One general difficulty in this type of relationship agreement is the propensity of artists and writers to rush headlong to the commitment.¹⁹² The effect of standard form contracting and possibilities for general improvements to this method of representing the contract will be discussed fully later. The following is a selection of the clauses from the Schroeder/Macaulay Agreement. Examination of these clauses will go some way toward justifying both popular and judicial mistrust and ill feeling toward their complexity:

Clause 1 states that the contract will 'remain in force for a period of five (5) years from the date hereof (hereinafter called "the said term"). Clause 9(a) [following those clauses which quantify levels and percentages for payments and royalties] states that "If during the said term the total of the Composer's royalties hereunder and all advances thereon (if any) shall equal or exceed £5000 then this agreement shall automatically be extended

for a further five (5) years and for the purposes of this Agreement the said period of five (5) years shall be deemed to be included in and be part of the said term.

By these clauses the writer had committed himself for an indefinite period (subject to his royalties *and/or advances* exceeding £5000 during the initial term). It could be argued here that this indicates a certain level of commitment by the Publisher. If their intention through clause 9(a) was to retain the services of the writer indefinitely then they must make efforts to exploit his material. No level of income can be achieved by putting songs 'in a drawer and leaving them there'.¹⁹³

Clause 2 c) says that "The Composer will not during the said term directly or indirectly work for or render services or be affiliated to or be interested or connected with any person firm or corporation engaged in the music publishing business other than the Publisher . . . alone or in partnership". At Clause 3, "The composer hereby assigns to the Publisher the full copyright for the whole world . . . " Furthermore, at Clause 11 it stated that " The Composer agrees that if and when any copyright in any musical composition or lyric written or composed by him prior to the date hereof which is not owned or controlled by him at the date hereof shall revert back to him during the said term, then he will forthwith assign such copyright to the Publisher . . . "

What was quite astonishing to the court was that the Publisher had, at clause 9(b), the right to terminate the agreement "by giving the Composer one month's notice (subject to the postal clause at 14)". Alongside this the Publisher, at clauses 15 and 16, had the right to assign the Agreement or any particular work "to any person". While at 16b, "The Composer will not assign his rights without the Publisher's prior written consent". In other words the Publisher could determine or assign the agreement but the Composer could not.

It *would* be difficult for the lay reader to fully assess the individual and cumulative short and long-term effects of clauses of this type, scattered as they are through such a document.

6:3 The Paradox of Duration

The paradox of duration is the complexity of the relationship between the industry, and particularly artists' and writers' desire for a long-term relationship/career/commitment-against-investment, and the restraint of trade dictum that the enforced tie must not go on for longer than is reasonable. In *A Schroeder Music Publishing Co. Ltd. v Macaulay*¹⁹⁴ the duration of the restriction was measured against the established fact that it is impossible to hold a publisher (or for the sake of argument a record company) to any quantifiable activity for the successful, commercial exploitation of any specific work or number of works. It was considered that the contract was:

*[r]estrictive of the ability of the plaintiff to turn to account his compositions . . . in a manner that was against public interests.*¹⁹⁵

Thus, the onus was on *A Schroeder Music Publishing Co. Ltd.*, as the party seeking to rely on the *restraining* clauses, to prove that enforcement of this covenant would be in reasonable protection of their commercial interests, Lord Reid said:

*. . . if no satisfactory positive undertaking by the Publisher can be devised, it appears to me to be an unreasonable restraint of trade to tie the Composer for this period of years so that his work will be sterilised and he can earn nothing from his abilities as a composer if the publisher chooses not to publish.*¹⁹⁶

END NOTES

- ¹⁴⁰ Brownsword R.; *Co-operative Contracting*; Contract and Economic Organisation (Socio-legal Initiatives); Ed. Campbell D. & Vincent-Jones P. Dartmouth; 1996
- ¹⁴¹ *ibid.* P19 para.2; and P37-38
- ¹⁴² *A Schroeder Music Publishing Co. Ltd. v Macaulay* [1974] 3 All ER 616
- ¹⁴³ *cf.* discussion pp 97 et seq.
- ¹⁴⁴ [1965] 2 All ER 933; [1966] 1 All ER 725 [1967] 1 All ER 725 CA; [1968] AC 269 HL
- ¹⁴⁵ *ibid.*
- ¹⁴⁶ [1968] AC 269 at 293f
- ¹⁴⁷ [1969] AC 269 at 287-288G(3)
- ¹⁴⁸ [1968] AC 269 at 325
- ¹⁴⁹ [1967] 1 All ER 725 at 729B-C
- ¹⁵⁰ *ibid.*
- ¹⁵¹ *ibid.* 732 at E “... the classification must be fluid and the categories can never be closed”
- ¹⁵² [1965] 2 All ER 933; [1966] 1 All ER 725 [1967] 1 All ER 725 CA; [1968] AC 269 HL
- ¹⁵³ *ibid.* - this is where public policy comes in to play.
- ¹⁵⁴ *ibid.* - equality of bargaining power
- ¹⁵⁵ *ibid.* - this reasoning was upheld by Parker J. in *Panayiotou v Sony* [1994] EMLR 229; The Times June 30 (1994)
- ¹⁵⁶ [1974] QBD 1 All ER 171
- ¹⁵⁷ *ibid.* at 177 d-f
- ¹⁵⁸ [1974] 3 All ER 616 at 622g
- ¹⁵⁹ *Clifford Davis Management v WEA Records Ltd* [1975] 1 All ER 237 at 240a
- ¹⁶⁰ See discussion throughout, especially in the instances of Robbie Williams and the assumptions of George Michael’s lawyers on building their case against Sony as well as the defences of Shaun Ryder. below:
- ¹⁶¹ ditto
- ¹⁶² Greenfield S, Osborn G & Boon A; *Complete Control; Judicial and Practical Approaches to Commercial Music Contracts*; International Journal of the Sociology of Law; (Law and Popular Culture Special Issue). 1996; Vol. 84; pp 110.
- ¹⁶³ [1974] 3 All ER 616
- ¹⁶⁴ [1965] 2 All ER 933; [1966] 1 All ER 725 [1967] 1 All ER 725 CA; [1968] AC 269 HL
- ¹⁶⁵ [1974] 3 All ER 616
- ¹⁶⁶ *Frontiers of the Doctrine of Restraint of trade*; LQR; April 1969 at 229 et seq.
- ¹⁶⁷ *ibid.*
- ¹⁶⁸ [1974] 3 All ER 616
- ¹⁶⁹ [1974] 3 All ER 616
- ¹⁷⁰ *Esso Petroleum Ltd v Harper’s Garage (Stourport) Ltd.* [1968] AC 269 at 328
- ¹⁷¹ [1937] 1 K.B. 209
- ¹⁷² [1974] 3 All ER 616
- ¹⁷³ *ibid.* at 621 e-f But compare with EMI at Note 27 above.
- ¹⁷⁴ *Ibid.* at 621 a (clauses 2 & 2c), b (clauses 5 to 8)
- ¹⁷⁵ *ibid.* 621 at i:
- ¹⁷⁶ But see pp 164 in this context *Walford v Miles* (1992) 2 AC 128 [1992] 1 All ER 453
- ¹⁷⁷ See also Humphries J.’ description of The Stone Roses, page 70 post.
- ¹⁷⁸ Contrast this series of assumptions with the frequent renegotiation activity discussed around the analysis of *Panayiotou v Sony* [1994] EMLR 229;
- ¹⁷⁹ *Instone v A Schroeder Co Ltd.* [1974] 1 All ER 171 at 173c. Also, in 1969 Macaulay negotiated an agreement with Pye records for Production rights.
- ¹⁸⁰ *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 618d-e
- ¹⁸¹ See details at p 81 per end note 179
- ¹⁸² “Love Grows Where my Rosemary Goes” position and Baby, Now that I’ve Found You” position
- ¹⁸³ Compare with Bette Davis in *Warner Bros. Pictures v Nelson* [1937] 1KB 209; See also Lord Reid’s dismissal of this form of restraint at [1974] 3 All ER 616, at 621 b
- ¹⁸⁴ [1974] 3 All ER 616. at 622f

¹⁸⁵ Trebilcock M J & Dewees D N; *Judicial Control of Standard Form Contracts*; ed. Burrows p & Veljanovski C G; *The Economic Approach to Law*; Butterworth & Co; 1981: pp93 et seq. at 99

¹⁸⁶ [1974] 3 All ER 616. at 624f

¹⁸⁷ see end note 185.

¹⁸⁸ generally beyond this discussion

¹⁸⁹ *Evans v Llewellyn* (1787) Cox 1 CC 333

¹⁹⁰ As will be discussed later, the cause of *artist v company* disputes in music industry cases is generally a desired increase of percentage shares of royalties, advances and the distribution of expenses, or suspicion that due fees are being maliciously withheld.

¹⁹¹ [1974] 1 All ER 171 at 172

¹⁹² See Osborn, Greenfield & Boon pp128

¹⁹³ As per Lord Reid, see p 80 above, and his further discussion marked at end note 174

¹⁹⁴ [1974] 3 All ER 616

¹⁹⁵ [1974] 1 All ER 171 at 172b

¹⁹⁶ [1974] 3 All ER 616 at 621-622

7: Abusing a Doctrine Will Cause Further Lack of Clarity in the Law

Notwithstanding the difficulty for inexperienced laymen of understanding formal contractual documents, and the presence of the duration paradox, it is felt here that circumstances encourage parties to rely on what might be a misunderstanding of the intent of the legal doctrine of restraint of trade, even allowing for the super-added principle of inequality of bargaining power. What this strain of contract law does achieve, is a means to resolve a bad relationship that would otherwise involve quite nasty, often personally damning allegations. Some variation of a 'walk-out'¹⁹⁷ threat can be assumed to be quicker and cheaper than charges of, say, criminal deception, especially where the chief desire is release.¹⁹⁸ The fact is that Tony Macaulay entered into litigation with the singular intention of being released from his obligation to the publishing company. The company had made an accounting error and was actually attempting to correct it, but Macaulay suspected (possibly wrongly) that some of his royalties payments were being deceitfully withheld. Although the case, in the end, turned on a strain of restraint of trade to facilitate his release from future obligation, this was not his initial choice for action. However, in response to his plea that A Schroeder Music Publishing Co. Ltd. had *repudiated*, Russell L.J. found that:

*In connection with this matter there were undoubtedly a number of very strange circumstances on the Schroeder side which might have been indicative of a deliberate plan to defraud the plaintiff. . the judge did not find fraud on the Schroeder side, and in our view it would be quite wrong for us in the circumstances to make such a finding on a paper trial . . Not to put too fine a point on it the plaintiff was trying to get out of his contract . . . we would not, therefore, have agreed with the judges conclusion that the contract, if enforceable, was repudiated. As, however, we agree with him that the contract was unenforceable as being in restraint of trade, it follows in our opinion that the plaintiff was entitled to succeed in his action.*¹⁹⁹

The confusion arising from the apparent difficulties in applying restraint of trade, in cases where it is inappropriate, is possibly the reasoning that prompted George Michael²⁰⁰ to expect as a necessary corollary that he would be seen as something of a helpless victim, subject to the Sony Corporation's will. Thus he too hoped to have his

contract declared unenforceable and his approach was the allegation of restraint of trade.²⁰¹

Parker J. could not

“ . . find sufficient grounds for excluding [the 1988 agreement] from the application of the doctrine . . . its provisions require to be justified by reference to the Nordenfeldt test”,²⁰²

and having applied that traditional test he found that no such onerous restraint was in operation. Dissatisfied with the application of restraint of trade in this case Parker J. cautioned:

. . .it is dangerous to attempt to extrapolate by reference the decisions in a particular case, or to apply a decision on one set of facts to cases with different facts. Were the doctrine of restraint of trade capable of being applied in such a straightforward manner, both the hearing of this case and this judgement would have been a good deal shorter.

However, such a caution in such a high profile case has not, it seems, deterred later artists from continuing to consider the doctrine as a tool to undo their obligations. For example Robbie Williams,²⁰³ immediately after leaving the successful band, ‘Take That’, sought to veto the final release of the band’s work together, *Take That Greatest Hits Collection*. BMG owned RCA were reportedly asking a cash payment and override of up to £1million. The singer was making his first preparations for the release of his first solo album and felt that the Take That material would interfere for a variety of reasons. His party alleged restraint of trade’ reasoning that this would render the contract, inclusive of a ‘leaving member’ clause, unenforceable. That contention was settled by a compromise agreement for Williams to honour his obligations to the company. The cost of preparation for the action, which would have been heard in the High Court, was estimated at £100,000.²⁰⁴

Furthermore, restraint of trade, albeit a late addition to the pleading, was possibly always in the back of the mind of Sean Ryder’s advisor:

. . . he kept his views about the enforceability of the management agreement to himself. . .

That comment has strong undertones in the light of the interview material provided by Greenfield S, Osborn G & Boon A.²⁰⁵ at page 77 above, where there is virtual admission that advisors set up grounds for a plea in restraint or trade before the relationship proper is even begun. This in itself puts the artist in the position of breaching the doctrine of *good faith* as expounded by Lord Mansfield:

*The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into the bargain, from his ignorance of that fact and his believing to the contrary.*²⁰⁶

Although not specifically mentioned in the case, this principle would go a long way toward explaining the legal point of view regarding Sean Ryder and his advisor.²⁰⁷

One distinction that must be noted is that George Michael had, on more than one occasion, personally renegotiated the terms of his contract. This negated, according to Parker J., any consideration of inequality of bargaining power. The same distinction, on analysis, also fetters the Macaulay strain of restraint of trade which would otherwise hold that an agreement *restricting free trade* would be void unless proven reasonable.

END NOTES

¹⁹⁷ See text at p 77 end note 162;

¹⁹⁸ When Sony Corporation took over CBS Records Singer George Michael is reported to have described this new arrangement as an *arranged marriage*. All he really wanted was a 'divorce'.

¹⁹⁹ [1974] 1 All ER 171 at 179g

²⁰⁰ *Panayiotou v Sony* [1994] EMLR 229;

²⁰¹ Other issues over the possible breach of Article 85 are of no interest here.

²⁰² [1994] EMLR 229; at 381

²⁰³ Gorman P.; *Music Week*; March 2, 1996

²⁰⁴ *Music Week*; March 2 1996 and March 9 1996

²⁰⁵ Greenfield S, Osborn G & Boon A; *Complete Control; Judicial and Practical Approaches to Commercial Music Contracts*; International Journal of the Sociology of Law; (Law and Popular Culture Special Issue). 1996; Vol. 84; pp 110.

²⁰⁶ *Carter v Boehm* (1766) 3 Burr. 1905; at 1909-10; 97 E.R. 1162 at 1164.

²⁰⁷ *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901

8: Why Has this Area of Contract Remained in the Domain of Common Law: Why Not Statutory Intervention?

Around 1747 Lord Mansfield considered the possible effects of legislation as a form of control over the trading practices in the marine insurance industry. His conclusion was that such law was too often likely to be built upon biased or mistaken opinion causing the imposition of rigid and inappropriate rules. Free and profitable fair trade could be fettered if legislative intervention were to be encouraged.²⁰⁸ He said:

*We ought to be cautious in making any new regulations or prohibitions with respect to trade, however plausible the pretences may be that are offered for introducing our approbation.*²⁰⁹

This view can be extended to suggest that all legislative intervention is similarly dangerous and susceptible to contemporary political biases. Interestingly, Atiyah continues to point out Lord Mansfield's disapproval for ordinary juries:

*. . . in commercial cases he was convinced that the unpredictability of a jury's decision was a major source of dissatisfaction to businessmen.*²¹⁰

When considering the governance of a specialist industry such as the music industry both of Lord Mansfield's notices of caution seem valid. Add to this the view held here that similarly to juristic unpredictability, Judicial horse sense alone is not efficient at guiding the behaviour of a general business population, and it becomes difficult to evaluate who should formulate and deliver qualitative law for behavioural governance within specified business sectors. Lord Mansfield overcame this by calling in special juries.

*They were to decide the individual case in such a way that that the judges would then be able to use that decision as a base for the erection of general rules of law. In this way the law could at once become more predictable, more regular, and more in accordance with commercial customs.*²¹¹

Of course this is not a practicable option any more but it is felt strongly here that the judiciary should examine the possibilities for exploiting their potential as influencers and governance factor to business communities such as the music industry. While they may not be able to specialise *per se*, they are surely in a position to develop more specialist communication techniques in respect of the business man on the street. Taking a broader view, any type of person or group can become involved in long-term

or far reaching contractual relations, so it would be difficult, extreme and restrictive to expect Parliament to invent and draft sufficient, suitable legislation. Innovation in this area is better done at common law. The alternative doctrine, suggested here to be a doctrine of *Unconscionably Constructed Contract*, has not been formulated because the common law has not yet been properly stimulated to think it through thoroughly. Although the concept has often been initiated through common law debate, no judge has yet drawn up a conclusion. The Law commission, 1965, did consider the possibilities of codifying contract law. This came to nothing and has been described by an academic colleague as 'pious aspiration'. However, and as previously mentioned, in response to public pressure and in protection of welfare, Parliament has drawn up legislation to regulate some areas of contract law.²¹²

The following statement by Lord Denning shows that the common law will not and does not need to await legislation for reform, instead dependence lies upon the flexibility inherent in the nature of common law:

*There is a bill now before Parliament which gives effect to the test of reasonableness [i.e. The bill which led to UCTA]. This is a gratifying piece of law reform; but I do not think we need wait for that bill to be passed in law. You never know what may happen to a bill. Meanwhile the common law has its own principles ready to hand"*²¹³

It must be made clear in this discussion that the machinations of common law and legislation are not as much at loggerheads as might be suspected. It is not a simple contest of either/or. The weak spot here seems to be that although judicial Realists are excellent innovators, they seem to be inadequate designers. If Parliament were to attempt to codify contract law much of it would have to be rewritten in order to encapsulate it. That exercise would take too long and would be in danger of damaging that which is good by the inevitable attempt to restrict concepts on paper.

It seems that the judiciary themselves cannot agree on the most effective method for reform or enlargement of contract law. For example, the concept of inequality of bargaining power was raised *obiter* by Lord Denning M.R. in *Lloyd's Bank v Bundy*²¹⁴

and his analysis and suggestions for structured categorisation in this area opened the possibilities for common law to construct a new chapter. This venture, like many of Lord Denning's proposals, was not without support. Chitty,²¹⁵ for example, responded:

Unless and until a general doctrine along the lines suggested by Lord Denning is recognised it seems that a contract will only be set aside if it falls within one of the recognisable categories of 'victimisation' - such as duress, undue influence or taking advantage of poverty and ignorance.

On this matter however, the Formalist²¹⁶ approach, chiefly brought to the fore by Lord Scarman, prevailed.²¹⁷ Is this juxtaposition of Realists and Formalists in fact a conflict barring progress? Or is it that the natural inter-play of the judiciary prevents the formal adoption of *prima facie* weak and difficult law? It is felt here that the latter is more often true. However, this practice so far has evoked a tendency to focus narrowly on a concept, such as inequality of bargaining power because it has a title and has been raised *arguendo* with much credibility. Once such focus dominates progress then new law cannot simply develop. What must be hoped is that because of the nature of the machinations of common law, when an important suggestion has been thrown into the ring, cross-case debate will ensue. The difficulty for the population with a vested interest is the passage of time. It is possible for decades, if not centuries to pass between the suggestion of a legal concept and the satisfactory adoption of that concept into a structured doctrinal tool.

In this instance, Lord Scarman was perhaps over cautious in his bid to protect the clarity of existing law and did not seem to deal comfortably with the possibility of new rules of law except where they *are* drafted by Parliament. This suggestion is supported by his comment on "the world of doctrine" in the passage below. He pays no attention to the fact that undue influence, the doctrine he intended to protect from corruption, was itself a development at common law in equity. During the 1760s, in an un-reported case Lord Mansfield is credited with having said: "What! Pass a judgement to do mischief, then bring in a bill to cure it!" Lord Scarman does not intend to suggest this, he in fact states:²¹⁸

There is no precisely defined law setting limits to the equitable jurisdiction of a court to give relief against undue influence. This is the world of doctrine not of

neat tidy rules. [He continues, however, to attempt to neaten and tidy the approach he must now take:] The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as un-impeachable unless it can be held to have been procured by undue influence. It is the un-impeachability at law of a disadvantageous transaction which is the standing point from which the court advances to consider whether the transaction is the product merely of ones own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case.

He has had to jump from his general preference on the one hand of the rigidity of legislation for the purpose of filling gaps in common law, to an acceptance on the other hand of the fluidity and flexibility of the notions of equity as an agent of judicial conscience. It is felt here that to leave definition of the ethos of law to be altered *ad hoc* at the discretion of the judiciary (especially where it must be applied to long-term business relationships) cannot provide any framework or governance to guide future behaviour and is, as a practice in itself, unfair and potentially damaging. What is suggested is that there should be an amalgamation of the approaches of Lords Scarman and Denning. There can be quality development via common law cross-case debate, provided that the discussion is focused on the needs of the litigants and potential litigants rather than on the methodology of law itself. When good conclusive rules are generated they will necessarily guide both judiciary and contractors alike.

On the matter of formulation for a foundation for new progress, both the doctrine of undue influence and of restraint of trade, where *inequality of bargaining power* has been considered to some effect, are developing, and probably sufficiently in their own niches. By setting aside these areas, the opening exists for framing unconscionability at common law rather than having it via legislation. Starting afresh would offer flexibility, debate and formulae at levels which the legislative time-tabling necessarily restricts. Whether or not stimulation for such activity is stirring in contemporary law remains to be seen. There is certainly evidence that the law in this area is currently being

progressed. If Lord Scarman was uncomfortable with progress via common law, footed in decisions requiring judicial conscience to focus on public policy, then that hardship has been brushed aside in the later case *CIBC Mortgages Plc v Pitt*²¹⁹ where Lord Browne-Wilkinson has taken up the issue that: “Unfortunately the attention of the House in *Morgan*²²⁰ was not drawn to the abuse of confidence cases”. In fact Lord Scarman did not ignore or overlook this issue he diverted consideration of it by criticising those cases:

“ [a] mis-representation of the facts, as is all too frequent in this branch of law, of words and phrases such as ‘confidence’, ‘confidentiality’, ‘fiduciary duty’ ”²²¹

END NOTES

²⁰⁸ Atiyah P.S.; *The Rise and Fall of the Freedom of Contract*, Clarendon Press, 1979: p121-122

²⁰⁹ *Parliamentary History*, xiv, col. 116.

²¹⁰ See end note 208 above: at p 95 See also comments above at note 88

²¹¹ *ibid.* p123 own emphasis

²¹² Examples include: Property Law, Employment Law, Consumer Protection etc. Some of which will be called upon later to demonstrate the difficulties of drafting rules to a satisfactory effect.

²¹³ *Levison v Patent Steam Carpet Company Ltd.* [1978] Q.B. 69 at 79. Own emphasis

²¹⁴ [1975] Q.B. 326 at 337

²¹⁵ *Chitty On Contracts; General Principles*, 26th ed.; Sweet & Maxwell; 1990; at 542

²¹⁶ Adams J.N. and Brownsword R.; *Understanding Contract Law*, Second Edition; Fontana Press; 1994

²¹⁷ For later development see Lord Browne-Wilkinson p 95; end note 219

²¹⁸ *National Westminster Bank v Morgan* [1985] 1 All ER 821 at 831 d-f To round off the argument made here see Lord Browne-Wilkinson Development below p 95; end note 219

²¹⁹ *CIBC Mortgages Plc v Pitt* [1993] 4 All ER 433 at 439j

²²⁰ *National Westminster Bank v Morgan* [1985] 1 All ER 821

²²¹ *ibid.* at 826 g

9: The Concept of Co-operation

The great majority of what is discussed here is generated from studies of judicial activity. However, case law sparks a great deal of learned interpretation beyond the confines of the court. Of particular interest here is the concept of *co-operation*.

Logically it must be said that co-operation ought to exist as a matter of course, given the duration of many long-term contractual relationships. However, the question framing this concept is whether such co-operation exists or whether it is merely a misconception underpinned by observation of activities otherwise intended to achieve *utility maximisation*. It is natural play in business to insure realisation of the maximum self-benefiting gains from the contract. The point of view supported here is that contract law should provide a governance structure which would include provision of clear behavioural rules, *co-operation in mutual good faith* being key among them. The following analysis is intended to establish whether it is feasible to propose rules encompassing *co-operational* behaviour, i.e. does such behaviour exist?

The 1994 Annual Conference of the Socio-Legal Studies Association held at the University of Nottingham has provided several papers discussing the possibilities of *co-operation*. Of these, three have been selected for discussion here:

9:1 Co-operation Intra-Contract or Mere Economic Self Interest and Utility Maximisation: The point of View of Roger Brownsword²²²

As Brownsword acknowledges, the classical model of contract concentrates on discrete or spot transaction in contractual behaviour, not long-term relations. That model is too narrow to attract credibility in a study such as this. Despite the popular model a great percentage of contracts are either long-term performance dealings or are units within a series which represent a long-term business relationship. Brownsword also joins voice with Stewart Macaulay²²³ and Ian Macneil²²⁴ in supporting the view, here concurred, that the standard western market-economics model must be criticised for distorting reality for much the same reason. This model tends to assume perfect market information in addition to discrete transaction. “*Accordingly*”, Brownsword suggests, “*a new co-operative model of contract beckons . . .*”

The next question which he addresses is whether the currently acknowledged spirit of co-operation is driven by morals or prudence? In examining the criterion of co-operational contractual behaviour he suggests joint investment, mutual dependency and reciprocal performance which, he says, accrue obligations of mutual responsibility and restraint on the natural prioritisation of self-interest. He encapsulates this by concluding that:

*. . . therefore, the criterion of co-operation is whether self-interest action by a contracting party is compatible with the contractual community of interest.*²²⁵

Next he examines the scope of co-operation in contract and here he introduces the concept of the doctrine of good faith as a carrier for co-operation [The development of 'good faith' in this context is intended to be discussed separately later]. The scope of co-operation is dependent on the interpretation of the relationship between the principle and the contract. For example, that if the view is *contract-specific*, Brownsword feels, the scope of the principle is that it is operational post formation, so that self-interest is not served as a priority over performance. Alternatively if the view is *relational*, then periods between any series of contracts in a long-term [business] relationship as well as negotiation and formation are also subject to the principle. Self interest should not be prioritised during this interaction either. Finally if the view is *institutional*, then mutual trust and confidence come into play almost before the parties even meet, as pre-relational expectations. The element of co-operation being to live up to those expectations permanently, without specified effort on either part.

Brownsword then returns to the question of whether co-operation during the term of a contractual relationship is founded on a moral basis or driven by prudence and self-gratification? It is felt here that he goes into a question that is impossible to answer, because co-operation might well suit to serve self-interest. The two are not mutually exclusive and it is not often possible to say whether the initiator is, in truth, morally or commercially driven. At any one time one can only take *his* word for it. The case used to illustrate apparent co-operation is *Williams v Roffey Bros. and Nicholls (Contractors) Ltd*²²⁶ where the Court of Appeal, as Brownsword notes, saw the behaviour of the main

contractor, in offering financial relief to a sub-contractor, as of “practical benefit” at that time. In fact (and the reason for litigation in this case) the main contractor reneged on this secondary agreement, so was he being altruistic or deceptive? Was he ever co-operating or only ever deceiving? Obviously the court will not indulge in a general debate about the scope of moral behaviour and altruism in forging its advice. At the bench it cannot be practical for a judge wholly to transpose his reasoning to philosophy. However, Brownsword has argued that insisting on the presence of moral motivation is the only clear basis by which co-operation can be distinguished and treated as governable contractual conduct:

*The answer is that the concept of co-operation can only serve as a significant theoretical construct if it breaks free from the model of action-guided-by-self-interest which is central to the classical view of contract.*²²⁷

9:2 The View of Hugh Collins²²⁸

Hugh Collin’s approach is more pragmatic. He begins by focusing on *Williams v Roffey Bros. and Nicholls (Contractors) Ltd*²²⁹ and acknowledging that, in that case, the main contractor was aware of the financial difficulties of the sub-contractor, which knowledge influenced the decision to modify the price rather than insist on strict performance of the original contract.

He goes on to demonstrate his argument by citing other areas, such as commercial contracts between engineering businesses²³⁰ where co-operation beyond the framework of the contract is quite normal. Here he errs on the side of Brownsword’s *institutional* interpretation of behaviour, where reputation, trust and confidence are the foundation of the relationship beyond the contract itself. Throughout the argument Collins seeks to distinguish between discrete contract, the conventional model precept, and long-term contractual relations. This distinction, in retrospect, seems hardly necessary unless the point is to be made that major adjustments and modifications, which can cause problems during a long-term relationship are, invariably, directly addressed in spot contracts and are dealt with in the instant.

Following his own lead, Collins continues to define aspects where co-operation is corollary to contract, such as the actual performance of exchange, long-term mutual profit realisation, or the relationship patterns integral to business partnerships. These he distinguishes from discrete transaction definitions and he is thus able to suggest that co-operation in many guises is intrinsic to long-term contractual relations. It is the relationship rather than the rules of contract that will set the behavioural norms. Having broadened the scope of his argument to include socio-behavioural patterns which may compete with behavioural rules at contract law Collins points out:

The patterns of behaviour of the main contractor in Williams v Roffey Bros. and Nicholls (Contractors) Ltd²³¹ may be described as vacillation between normative referencing points.

So he has recognised that the decision to increase payment terms and the intention to renege (whenever that intention was formed) are both decisions founded in self-interest. He concludes:

. . . reflect upon the improbable task that theories of long-term contract have set themselves. These claims that long-term contracts involve co-operative behaviour seem deeply mysterious, for they commence with imagining strangers in the marketplace being drawn together out of economic self interest, but then these strangers form a contract in which self-interest is sacrificed to a commitment to a common goal. How does this metamorphosis of behaviour take place? My suggestion is that it simply does not. What does take place however, in long term business relations is that the parties concerned have multiple objectives, not simply to enjoy the fruits of any contracts, but also to preserve that relation, which itself will depend upon observance of competing norms of behaviour.²³²

At his conclusion Collins, like Brownsword, suggests that for ease of legal analysis, the doctrine of good faith must be incorporated into future courtroom deliberations as a foundation on which concepts of expectations and flexibility over the duration of a long-term contractual relationship can be designed. He adds that the relationship itself must be viewed as a whole and not just in accordance with the fixed terms of the contract. Both Brownsword and Collins have described their perspectives in greater

depth than may be suggested here, and they provide valuable bases for behavioural analysis.

When describing *Procedural Unconscionability*²³³ as inclusive of all the circumstances surrounding the contract, the intention here includes that this will encompass the relationship beyond the contract and all the expectations so raised. Music industry relationships such as those of Macaulay, O'Sullivan or Panayiotou²³⁴ demonstrate long-term relational expectations very well. The disputes which have arisen in this field display disappointments which were formed not only during the life of the contracts, but also as a result of expectations built on the understanding of the relationship as a whole.

9:3 The view of Morten Hviid²³⁵

Morten Hviid provides a more demonstrative analysis of long-term relations and co-operation. He sets out by making the point that manufacturers *only rarely use the terms of contracts or resort to contract law to settle disputes in ongoing relationships*.²³⁶ It must be stated here that it is believed that *The Contract* is constantly an issue in music industry relationships and is frequently levied as both sword and shield in resolving difficulties either in or before litigation.

Hviid moves on to define the nature of the relationship he is intent on analysing, and provides four important [to the relationships under general discussion here] measures:

- i) Repeat performance within the contract;
- ii) No definite pre-specified final date of the contract or fixed number of performances;²³⁷
- iii) A complete contract cannot be written, and states where obligations cannot be defined can occur throughout the life of the contract;
- iv) The contracting parties are rational, intelligent decision makers, maximising their own utility function.

In relation to point (iv) Hviid intends to show that maximisation does not necessarily reflect conflict of interest, because:

co-operative behaviour can emerge to the extent that the contracting parties will rely on each other to renegotiate in good faith where any gaps emerge.

This supports the view of music industry contractual structure, especially in relation to record company contracts. The gaps suggested are where obligations are not defined within the text of the contract or where one party believes there to be a gap. Those gaps and the act of overcoming them where they are discovered are not necessarily viewed as bad behaviour or bad contract building, they are just facts of the effects of the passage of time. Hviid’s point, and largely the point under discussion here, is that these gaps and the resulting behaviour are potential catalysts for a breakdown in relations. Similarly to Hviid’s view it is the understanding here that the form of the contract is not reduced in importance if contract law is found to be lacking, or is avoided altogether when the parties reach an issue requiring resolve.²³⁸

He then turns to the model provided by Kreps:²³⁹ the ‘trust’ game, by which he proposes the probable behaviour within long term contractual relationships given variations on outcome depending upon the criteria of reaction to given levels of trust and subsequent action and reaction. It is conjectured that both bargaining power and expectations are taken into account under this method of analysis.

The trust game model is as follows: ²⁴⁰

| Player <i>I</i> | Player <i>II</i> | |
|-----------------------|--------------------------|-------------------------|
| | Honour <i>I</i> ’s trust | Abuse <i>I</i> ’s trust |
| Trust <i>II</i> | 10/10 | -5/15 |
| Don’t Trust <i>II</i> | 0/0 | 0/0 |

The figures show the supposed balance of gain according to whether trust is invested by player *I* and whether that trust is abused by player *II*. If, as Hviid suggests, the game were to be repeated throughout the life of a contractual relationship the outcome would suggest one of two possible strategies be adopted:

1. Start by co-operating on the Trust outcome. Continue co-operating until the other party breaches, then never co-operate again.
2. Start by co-operating on the Trust outcome. If someone deviates from the agreement, punish for a number of periods long enough that any initial gain from breaching is wiped out. Then forgive and return to

the co-operative agreement. Any breach either of the initial promise or the agreed punishment phase results in restarting the punishment.

This reads like something relating to nursery strategy suggesting the training of small children.²⁴¹ Scenario 1., triggered by breach and with no forgiveness is known as the *grim trigger* strategy. Scenario 2. is called the *stick-and-carrot* strategy.

Hviid moves on to include four more issues which he feels must be important for ensuring co-operation:

- a) The gain from deviation
- b) The value of punishment
- c) The importance of the future
- d) The speed of detection

He concedes that the possible immediate benefits from opportunistic behaviour which results in deviation may, in the mind of the relevant party, outweigh the future losses brought on by punishment of future loss of trust. It is believed here that this state of mind is common and dangerous in the music industry as it betrays short-sightedness and failure to recognise long term career objectives. Combined with historical experience and industry custom which dictate suggestion that the life expectancy of artists' careers will average five years,²⁴² deviation justified by a shallow acceptance of the four above criteria (immediate gain; bravado toward 'punishment'; devalue the future and promote ignorance) may play a major role in the tendency toward non co-operation, non trust and relationship sully in many instances. On the other hand, each relationship in the music industry is founded in the hope and expectation that it is the beginning of a long and fruitful career, so it would not be true to suggest that 'the future' is not significant.

Overall, Hviid has pulled together a useful, simplified approach for identifying the behaviour and expectations of parties to some long-term contractual relations. As he suggests at his conclusion, the *arguments are simple and the assumptions are stark*.

END NOTES

- ²²² Brownsword R.; *Co-operative Contracting*; Contract and Economic Organisation (Socio-legal Initiatives); Ed. Campbell D. & Vincent-Jones P. Dartmouth; 1996. P 14 et seq.
- ²²³ Macaulay S.; *An Empirical View of Contract*; 1985; Wisconsin Law Review 465 at 468
- ²²⁴ Macneil I.; *Exchange Revisited: Individual Utility and Social Solidarity*, 1986; 96 Ethics 567 at 591-2
- ²²⁵ See end note 222 above. p 19. Own emphasis
- ²²⁶ [1990] 1 All ER 512
- ²²⁷ As end note 222 above; at p 23
- ²²⁸ Collins H.; *Competing Norms of Contractual Behaviour*; Contract and Economic Organisation (Socio-legal Initiatives); Ed. Campbell D. & Vincent-Jones P. Dartmouth; 1996. P 67 et seq.
- ²²⁹ [1990] 1 All ER 512
- ²³⁰ As end note 228 above; at P 68-69
- ²³¹ [1990] 1 All ER 512
- ²³² Were the Reasonable Man here present he might reply with a testy 'Yes, of course'
- ²³³ See p 169 below:
- ²³⁴ As discussed separately throughout.
- ²³⁵ Hviid M.; *Relational Contracts and Repeated Games*; Contract and Economic Organisation (Socio-legal Initiatives); Ed. Campbell D. & Vincent-Jones P. Dartmouth; 1996. P 125 et seq.
- ²³⁶ Re: Beale H. & Dugdale T.; *Contracts Between Business Men, Planning and the Use of Contractual Remedies*; 2 British Journal of Law and Society, p 45; 1975
- ²³⁷ Note: in connection with point (ii) it is considered here that although record company contracts are generally for a fixed number of years, it is supposed that in the interests of career building the artist and the record company view this as a rolling arrangement which can continue in perpetuity. Hviid distinguishes this arrangement as a series of *periods*.
- ²³⁸ Hviid at pages 127/8. Ref: Macaulay S.; *An Empirical View of Contract*; Wisconsin Law Review 465; 1985, Macneil I.R.; *Relational Contract: What We Do and Do Not Know*; *ibid.* 483 and Campbell D. And Harris D.; *Flexibility in Long-term Contractual Relationships: The Role of Co-operation*; 20 Journal of Law and Society; P166; 1993
- ²³⁹ Kreps D.; *Corporate Culture and Economic Theory*, in Alt J. and Shepsle K. (eds), *Perspectives on Positive Political Economy*, Cambridge University Press: Cambridge; 1990
- ²⁴⁰ Hviid gives variation in outcome which are not necessary here.
- ²⁴¹ The significance of this comment will become clear post. See Shirley Bassey at en 253; p107 et. Seq.
- ²⁴² Tremlett G.; *Rock Gold, The Music Millionaires*; Unwin Hyman; 1990 Ch. 1.

10: The Nature and Characteristics of Those Who Constitute the Music Industry

In order to understand exactly why the area of contract law under discussion has, as contended here, failed to communicate with classes of contractual relationship holders, it is necessary to define the nature and characteristics of those classes. Of interest to this study are those sets that make up the popular music industry. Once the qualities of these sets are understood, and the shortfalls of attempted communication identified, it will be possible to address a fresh and more successful approach. Before breaking them down into groups of type, there is one character trait which they can be said to hold in common and which must be recognised as critical to understanding their relationships. That is that they are all *entrepreneurs*. Having said that, there is some academic contention over the meaning of the term entrepreneur so *Appendix 4* is intended to elaborate on what is meant by the term here, and thus how individuals within the music industry fall into this criteria. In brief, they are each risk takers, and each will commit substantial investment to the bargain.

It is intended here, to establish patterns of reactive behaviour in given circumstances and from that study to model a best-approach hypothesis for potential influencers such as contract law. The study will view the industry as one made up of two distinct factors: Businessmen²⁴³ and Creative Artists. Although the initial cost for either may not necessarily be a money-cost, it is presupposed that there is a risk-investment for each at the outset of any project, i.e. opportunity costs will be inherent in the commitment to any one relationship, and thus both maintain entrepreneurial status. The structure for the following study is footed in Eichner's model of *anthropogenic studies*,²⁴⁴ requiring the study of all personal development influencers. This includes family type and background, school type and experiences, experiences in the work place and work places experienced etc. This approach will be combined with the similar approaches by Briggs-Myers²⁴⁵ labelled *Nomothetics*, which is primarily concerned with the collection of group data but which studies evidence of personality traits in order to produce measurements and draw comparators for behavioural patterns, and with the suggestions raised by the work of Dr. Albert Rothenberg, M.D., in *Madness and Creativity*.²⁴⁶ Thus it is suggested that the theoretical legal doctrine of *Unconscionably Constructed Contracts* can be designed and tested here on an *ex post* model (reactive response to

legal rules as guidance and governance factors, predicted on the grounds of experience rather than simply predicted) rather than the classical approaches which tends to be *ex ante* in nature.²⁴⁷

10:1 The Businessmen

First of all, who are these people? What have they got in common beside their careers? Although the cases and jurisdiction under question here are English, it cannot be ignored that the industry executives who are involved come from a variety of countries and cultural backgrounds. In fact, one of the most recent significant cases, *Panayiotou v Sony* [1994]²⁴⁸ involved Japanese decision makers. This cultural distinction is comparatively new to this industry and note will be made, where relevant, of any significant behavioural or reactive factors in long term relationship building.

The table at Appendix 5 shows a break-down of the background and reported characteristics of a sample of executives relevant during a time span encompassing *A Schroeder Music Publishing Co. Ltd. v Macaulay*²⁴⁹ and *Panayiotou v Sony* [1994].²⁵⁰ From studying this selection a conclusion is drawn that these people are all quick to learn, impactively decisive, and, as a combination of these factors, quick to make judgement and act on it without necessarily referring to any past event or knowledge. (These conclusions are supported by some ten years of personal experience, working alongside some of this set in the music industry.) Furthermore they are each in a position of considerable decision-making power, they are surrounded by others similar to themselves who are either their 1) counterparts, 2) market opposition or 3) advisors. The majority of the subjects have switched from artist-management/agency, to publishing, to record company work according to career opportunities and industry circumstances. All of the above is generally achieved by operating in isolation which in turn highlights either volatility in nature because the subject is very self-focused and used to thinking in terms of achieving his goals instantaneously, or acute shyness, sharing important ideas and weighty expectations only with selected trusted colleagues. All the subjects are prone to private and very detailed time-tabling and planning. The privacy of this solo event management process means that the subject will be hurt, surprised or aggravated by interference with his expectations, but his belief in himself

and his instinctive capabilities continues to dictate that he will not expose his mind to others.

This group has a tendency to fall in to the Myers-Briggs category INFP, the exact significance of which will be discussed shortly. By analysing the nature of their perceptual process, an understanding can be developed of how they approach contractual relationships and how they will react to the outcome of litigation or respond to the threat of litigation. It is assumed here that perception is the apparent root-cause of behaviour. Consider, for example, three typical responses to a request for information:

- 1) one group may perceive the request as a threat and expect the information to be embodied in an attack against them;
- 2) another group may have no specific objection but will suspect that the information will culminate in some future interference in the way they go about their business;
- 3) another group may be very open and will give information freely with-out suspicion, expecting the free exchange of information to bring better relationships and forge a unity of trust.

Given the nature of this group it is felt that they will fall into category 2. It is unlikely that they will behave in the manner described in category 3). This means that they are not likely to develop contractual relations with any strength of bias toward good faith or co-operation. An example which illustrates these characteristics in long-term contractual relationship formation is:²⁵¹

Timing is almost as crucial to star making as talent is. Grossman²⁵² gave the impression of an unhurried, unscheduled man, yet he had a fine Swiss movement ticking in his mind. He worked out in detail his timetable for launching Dylan. Dylan was not always aware of Grossman's strategic move, just as Grossman was not always aware of Dylan's. . . . One of Albert's deals had to proceed without Bob's knowledge, for nothing is so fragile as a young performer's ego. . . . Grossman bought out Roy Silver's share of their partnership using OPM - other people's money. The OPM principle minimises risks and keeps ones own

capital free. . . . The deal was kept quiet mostly to give Dylan the feeling that he was achieving everything on his own.

The next quotation, written about himself by erstwhile English agent/manager of Shirley Bassey, Michael Sullivan,²⁵³ also gives some insight into the type of relationship which prevails in this industry. It illustrates what, in their minds at least, is some justification for the almost dictatorial behaviour of executives, which is the very behaviour which may be turned against them in a case relying on undue influence or restraint of trade. In fact Mr. Sullivan and Miss Bassey, at the time of this reported conversation, were some three weeks away from a court booking for just such a dispute over his exclusive management agreement with her. On this occasion they continued their relationship and the court case was dropped:

'Mickey', she said, 'you always treated me like a child. Like a freak. You arranged things without telling me and I only used to find out about them when somebody else told me or I read about them somewhere.

'I know that you were trying to save me from disappointment if things did not materialise, but at the time I thought you were doing things behind my back.

'People said to me "He's deceiving you" and I believed them. They said "You're the star. He only works for you".

The above information gives an outline sketch of those who were dominant in the music industry up to one commercial generation ago. What of the present day executives? Sony Music's President, Nobuyuki Idei, represents himself and his company as an entity which will make *dreams come true* for both artists and consumers.²⁵⁴ But at his time of falling out with Sony, George Michael stated that they treated artists as *little more than software*,²⁵⁵ while a Sony spokesman mentioned sadness and moral obligation as well as legal commitment.²⁵⁶ In 1996 Gerald M Levin, Chairman and C.E.O Time Warner Inc. delivered a speech discussing *giving life to dreams* and quoting classical literature and poetry to enhance his points.²⁵⁷

Whether from large or small companies the executives display a strong charge of motivation to continuously progress and build on the success of *their own* artists. The

nature of the category of artistic genre towards which the artist gravitates will dictate whether he or she will be developed as a gregarious and bright character such as the pop-star George Michael; an eclectic word-smith such as Bob Dylan or the quiet thoughtful writer such as Gilbert O'Sullivan. The scope of the executive personality is sufficient to adapt to the differing needs of each artist in his development. However, the weakness in the relationship is evident when either the artists wishes to substantially alter his persona, or when it transpires that the executive misread the persona and has attempted to cultivate the artist into something which he or she cannot become. Discussions about the fulfilment of dreams and citation of poetry are shallow (though not necessarily insincere) disguises when the relationship is, in fact, to be built solely on the grounds of productivity and commerce. The expectations of the creative party may be misguided.

However, it is possible to show that an approach of mistrust toward executives has brought about what might, to some degree, be construed as a harsh result through the court. The series of events which lead to *Denmark Productions Ltd. V Boscobel Productions Ltd.*²⁵⁸ included the fact that, Ray Davies, a member of the band The Kinks refused to travel to America on an important promotional tour unless the co-manager Larry Page (of Denmark Productions Ltd.) agreed to travel and to remain with them while they were abroad. This condition demonstrates a substantial degree of dependence and value vested in the management skills of Page. Surely it would have been foolish and financially risky if Page chose to test this relationship without genuine good cause. However, five days after the tour had commenced Larry Page needed to return to England, he told the rest of the group but did not tell Ray Davies that he was going back. Ray Davies became upset when he heard of Page's departure and the band made a decision to sever their management relationship. The grounds for severance were that the group had been left *in the lurch* so that there was a breach of trust and a total loss of confidence. Prima facie it could be suggested that, in this instance at least, Mr. Page had made every effort to compromise and fulfil the artists' demands to the extent it was possible for him to do without otherwise abandoning his other day to day business commitments.

Sometimes a manager or other executive will attempt to market the artist by unsuitable methods which the artists' real characteristics will eventually betray. The manager of pop band Take That, Nigel Martin-Smith, for example, insisted that the boys could not indulge in girl-friends, smoking, drinking to excess or swearing, *they were to be good, clean, uncomplicated and available.*²⁵⁹ This is a common and an understandable method for developing artists image, in this case - five boys from the north of England aged between 16 – 20. Martin-Smith was grooming them for a lucrative and successful pop-music career. But it quickly transpired, and eventually came to a head with Robbie Williams's threat of litigation to be released from his contract, that the personality of these individuals could not be forced to comply with the executive's preconceived plan. In the first instance the off-stage activities of the boys, particularly Robbie Williams, in bars and hotels and the like, appeared to be high jinx. However Nigel Martin-Smith could not be malleable enough in his visionary role to allow the genuine personality of Robbie Williams to be exposed. Severance of this relationship became inevitable. These developments have to move outside of the contractual relationship and nurturing them is beyond the current scope of fiduciary duty. These are the areas which might call for some form of co-operation within the contract to avoid the confrontational methods of escape which have so-far prevailed. After all, it is felt here that this type of character sterilisation is akin to that which supported George Michael complaint. He claimed he wanted to shift from teen-pop appeal to an adult rock audience, the record company did not support this in the short term because of the level of income that the teen-pop market represented via George.

It would be easy to derive an impression, from the anecdotes cited above, that the average music industry executive is an earnest and well meaning business man who occasionally pays the price for acting on bad instinct or mis-advise.

10:2 Development in the Industry - Will it Change the Characters Who Forge the Relationships?

As Entertainment Industry companies become dominated by yet larger corporations,²⁶⁰ it is expected here that Artists will find themselves dealing less often with those who fit the characteristics described above and more often with the less volatile and less

emotive business character such as those businessmen who might already be found within Sony. Canadian Management Company Song Corp. along with Roger Dent, city analyst at Yorkton Securities Inc., Toronto, predict that acts who sell less than 100,000 units per album will be dropped by these large organisations.²⁶¹ The focus for the new corporations will undoubtedly be on a requirement for high-volume turnover and the companies will be the owner-controller of all forms of entertainment from production through playback technology to consumption. While analysts are recommending a strong-buy in the smaller independent labels and distributors it is felt here that history in this industry already suggests that the independents will not have a long trading life before they are either bought out or pushed in to liquidation by the larger companies. Of the anticipated 'purging' band manager Allan Gregg commented:

*It is not because Time Warner or EMI are malevolent. It is done to satisfy the needs of a large organisation.*²⁶²

It will be the playback technology, presumed here to be computer operated, modem based, in-home multimedia/ entertainment centres,²⁶³ which will dictate the format for the output of music. It is probable that the consumer will select and rent or purchase at home rather than in record stores. Roger Ames, Chief Executive of Warner EMI Music and Ken Berry, Chief Operating Officer said at a press conference that the Internet would change the music industry even more profoundly than either the Sony Walkman or the compact disk did in the eighties.²⁶⁴

This shift in the distribution of music will render the Pollock QC./Sony list of expectations²⁶⁵ more critical and less flexible toward the whims of those of an 'artistic nature'. It is, therefore, of greater importance during the present period of change throughout the industry to establish the responsibilities of the corporate parties in relationship management and fiduciary terms. In simplistic terms it may be possible to say that these organisations are graduating from business which exist to promote the (ostensibly) best interests of their members to and profit from the resulting co-operative output, thus increasing their market share and status; to those which exist purely with the objective of raising profit for which market share and status are engineered by acquisition.²⁶⁶ This is not to suggest that the newly evolving corporations will be strictly impersonal toward artists but they will surely not indulge in the manner of knee-

jerk renegotiation or variation which has been entertained in the past. This is already apparent in the October 1991 meeting between George Michael, his manager Rob Kahane, publisher Dick Leahy and Sony World President, Norio Ohga, Sony Music UK Head Paul Russell, Head of Sony Music world wide, Michael Schulhof. It was at this meeting that George expected to be believed that it would have been in everybody's best interests if his contract was simply terminated and the material released back to him. The Sony executives simply did not agree, George Michael and Wham product represents a lucrative back catalogue (which Sony still own) and, while he was working to the 'pop' market, an equally lucrative foreseeable future could be predicted from his output. George was left to decide whether to pursue his desires through the courts. The Artist's decision was clearly not commerce or profit motivated as Sony's had been.

During the build up the recent Time Warner-AOL-EMI merger, it is reported²⁶⁷ that artists' agents and managers say:

. . . EMI's most powerful stars, which include the Rolling Stones, the Spice Girls and Radiohead, are likely to have change-of-control clauses in their recording contracts . . . If large numbers of artists seek new contracts, it could dramatically increase EMI's costs or lead to widespread defections.

What is more, Mick Fleetwood of Fleetwood Mac is among the first Artists to pioneer their own major league, artist-run alternative. Fleetwood is expanding his own company, Point Group to run an e-commerce website and is supported by the giant Microsoft:

*Without being a sour grape, some artists have not had a good crack of the whip in business. . . that has given me a sense of purpose.*²⁶⁸

Critical to the discussion here is the city analyst prediction that:

*The answer for record companies is to break new acts. . . . You've got to catch 'em when they're young and naïve, get them on a good contract and make a fabulous amount of money out of that. After that they're up for grabs.*²⁶⁹

If there is a deliberate move to seek out and exploit the young or naïve as new product, this approach to relationship building smacks of the *Lloyds Banks v Bundy*²⁷⁰ type of inequality and undue influence. It is possible that the new wave of artists to be signed up will be contractually less sophisticated than their predecessors as the desired

market/workplace becomes more global, appears 'new' and is subject to high profile discussion. The suggestion inherent in the comment quoted above is supported by Time Warner's own press release²⁷¹ that concentrates heavily on the potential developments of digital media as a distribution service for music and states:

. . . it is the proven ability of Roger [Ames, C.E.O. Warner EMI] and Ken [Berry, Chief Operating Officer Warner EMI] to find the newest acts and nurture the best talent that will truly distinguish Warner EMI music.

It is surmised here that, although current artists and substantial back-catalogue ownership are key to the immediate success of Warner EMI the hint given about their ability to source new [naïve] talent is critical to future development. What must be kept in mind is that, with the anticipated forthcoming Internet trade , as established artists leave the label the back-catalogue of material in which the label will retain ownership will be vastly valuable, this is capable of outweighing the loss of any individual artist or group. If contractual relationships are not governed from the outset by factors such as good faith, co-operation and the general concept of unconscionable construction then inequality of bargaining power is looming large at this juncture.

END NOTES

- ²⁴³ By which is meant corporate employees such as record industry, or publishing company employees and independent Businessmen such as managers, agents etc.
- ²⁴⁴ Alfred S. Eichner, *The Macrodynamics of Advanced Market Economics*, M. E. Sharp Inc., 1991, p868
- ²⁴⁵ Briggs & I. Myers, *Introduction to Type*; Oxford Psychological Press; 1987 – See Appendix 4
- ²⁴⁶ Rothenberg A. M.D *New Findings Old Stereotypes*; The Johns Hopkins University Press; 1990. Particular emphasis on passages concerning ‘motivation’ in creative people.
- ²⁴⁷ P. Burrows & C. G. Veljanovski; *The Economic Approach to Law*; Butterworth & Co. (Publishers) Ltd.; 1981 p 5 for further discussion on the difficulties of the general economics based approach.
- ²⁴⁸ EMLR 229; The Times June 30 (1994)
- ²⁴⁹ [1974] 3 All ER 616
- ²⁵⁰ EMLR 229; The Times June 30 (1994)
- ²⁵¹ Shelton R. *No Direction Home. The Life and Music of Bob Dylan*; Penguin Books; 987. P159/60
- ²⁵² Albert Grossman, Bob Dylan’s Manager 1963
- ²⁵³ Sullivan M.; *There’s No People Like Show People, Confessions of a Showbiz Agent*; Quadrant Books Ltd. 1984; P206. [This quotation may be construed as *reportage*, however, personal experience gained between 1978 -1990 serves to support the suggestion that this scenario is a fair depiction of typical behaviour and relationships in this business. It is intended here to accept that this type of evidence represents mere generalisations, but that this does not devalue its use in this context.]
- ²⁵⁴ See Appendix 7
- ²⁵⁵ Lynn M. & Olins R. *The Sunday Times*; *Music giants tremble as George battles Sony*; 17 October 1993 4/7
- ²⁵⁶ *ibid.*
- ²⁵⁷ Time Warner Inc.; www.timewarner.com/corp/about/timewarnerinc/corporate/sp.../vermont040196.htm; The 1996 George D. Aiken Lecture Series, The University of Vermont; *Dreamers of Dreams: Telecommunications and the Culture of Creativity*, 1 April 1996
- ²⁵⁸ *Denmark Productions Ltd. V Boscobel Productions Ltd* (1967) 111 S.J. 715; [1969] 1 Q.B. 699
- ²⁵⁹ Louise Gammon; *Boy Trouble* The Express, Saturday Magazine 6-12 February 1999: P 26/7
- ²⁶⁰ Sony Corporation; Seagram Co. (Universal Music Corporation who now own Polygram NV); Time Warner-AOL-EMI (EMI Already hold Virgin and Capitol Records in the UK)
- ²⁶¹ More than 200 musical acts were dropped as a result of the Seagram Universal Music, Polygram Merger: Bouw B. National Post; *Cancon could be victim of music mergers*; www.nationalpost.com/financialpost.asp; January 25 2000.
- ²⁶² *Ibid.* p2.
- ²⁶³ Ayers C. www.Sunday-times.co.uk/news/pages/tim/2000/01; *EMI merger – now the rock stars strike back*; 28 January 2000. Abrahams P. www.ft.com.Companies News/Media Entertainment; (Tokyo); *Sony Electronics group rules out counter-bid for EMI*; February 5 2000. Also: Time Warner Inc.; www.timewarner.com/corp/about/timewarnerinc/corporate/sp.../vermont040196.htm; The 1996 George D. Aiken Lecture Series, The University of Vermont; *Dreamers of Dreams: Telecommunications and the Culture of Creativity*, 1 April 1996
- ²⁶⁴ Ayers C. www.Sunday-times.co.uk/news/pages/tim/2000/01; *EMI merger – now the rock stars strike back*; 28 January 2000; p1
- ²⁶⁵ See above p 135 *Panayioutou v Sony* [1994] EMLR 229; The Times 30 June (1994)
- ²⁶⁶ See Larrinaga A. at 269 below
- ²⁶⁷ Cope N., Associate City Editor, www.independent.co.uk/news/Business/Inside_Business/200.../emiclash260100.shtm; *EMI may face stars’ backlash against merger*; 26 January 2000; p1
- ²⁶⁸ Source: Ayers C. www.Sunday-times.co.uk/news/pages/tim/2000/01; *EMI merger – now the rock stars strike back*; 28 January 2000; p2
- ²⁶⁹ *ibid.* Quoting Anthony de Larrinaga of SG Securities.
- ²⁷⁰ [1974] 3 All ER 757 CA
- ²⁷¹ Time Warner Inc.; www.timewarner.com/cgi-in/corp/news/indexcgi/template=article&article_1d=100037; Press Release; *Warner Group and EMI to Form World’s Premier Music Group*; 24 January 2000.

11: The Artists

During research for this work²⁷² interviewees have frequently responded to questions in the same manner:

Q: “Why would Fleetwood Mac/Macaulay/ Gilbert O’Sullivan, (etc.) enter into contracts containing such amazing provisions?”

A: “*They just wanted a contract*”.

“Music business lawyers used not to be so prevalent as they are nowadays”

“Somebody had a lot of money and a promise of success, the details were overlooked”

“They often believed they were going, ‘jointly’, into a business partnership!”

There seems a strong tendency both in and out of court to perpetuate the notion that artists as a class are, at least during their early careers, incapable of negotiating a fair deal. This appears to have remained true even when it became customary to employ ‘independent’ advice. The most recent case, *Ryder v Nicholl and Another*,²⁷³ proves an absolute inability on the part of the artist to negotiate terms for himself. In addition it is questioned here whether the advisor genuinely falls in to the category of ‘independent’. Even-so the Appeal judgements begins thus:

The appellant is about 36 and a rock musician. He had a difficult childhood in Salford and was a registered drug addict when still in his teens. In 1982 he formed a band called the ‘Happy Mondays’ which survived for ten years. . . . The respondents are husband and wife and of an older generation. They each have over twenty years experience in the music industry when they met the appellant. . .

With or without a drug addiction it is contended here, with all due respect, that a 36-year-old is no innocent, especially after a good ten years’ working in the rock industry. (Personal experience here would support this view. It can be confirmed that this experience enables verification that artists prefer to be relieved of as much business responsibility as possible while they do their work, but that experience also enables verification that this trait does not necessarily imply naivety or dull wits. Those with addictions are just as aware and opinionated about the industry within which they operate. Furthermore, on the part of business parties, in this as much as in any other

industry, longevity does not as a necessary corollary equate to a high degree of sophistication. That is to say that the one may be just as competent or incompetent as the other.) The overall suggestion which seems to prevail through the courts, however, is that artists constitute a class of people who, for over fifty years, have remained naïve and have, as a result, foregone responsibility for the habit of rushing into commercial agreements without reviewing the terms. In part this behaviour has been explained already, as it seems this class of people are often so desperate to attain these contractual relations that they dare not delay. Alternatively, they are careless and fulfil their need for the relationship by accepting whatever is presented to them. There is an element of self-sacrifice here as well as a blind faith that the corporate party will help them sort out their lot after they have proven themselves. Here then, there are personality traits which seem common; a combination of impetuosity²⁷⁴ and whimsical lifestyle shifts. If the manager, record or publishing company cannot, given current market place beliefs or bottom-line income requirements, indulge these shifts with the artists, then at the artists' behest, there is more likely to be a breakdown in relations than any compromise.

11:1 A Propensity toward Lifestyle Shifts is an Artist's Character Trait Which Can be Damaging to Long-term Relationships

One example of this can be given through noting what happened between The Beatles and Brian Epstein.²⁷⁵ As late as 1965 The Beatles were still paid £50 per week pocket money while Brian Epstein took care of all their expenses. The relationship was strong and they trusted him, he had managed their career to their satisfaction. The Beatles were certainly influential to other artists to aspire to gain a high percentage of ownership over as much of their publishing and recording product as possible. Owning a substantial share in the publishing company as well, if possible, as writing the material will greatly increase the revenue of artists and writers. Brian Epstein had signed The Beatles to a five year deal, this was and is customary as described in the passages above. By the fourth year of this agreement they had become successful, had established their own song writing companies and owned substantial shares in Northern Publishing. They had experienced touring throughout the world and were far more worldly and sophisticated than when they set out. Their expressed intention had been "*You look after the money, Brian - and we'll look after the songs*". There remains an unanswerable question as to

whether they would have continued a fresh five year period with Brian Epstein or whether they would have looked for a way to separate from him. During their fifth year in contract with Brian Epstein, 1966-7, they cut back on public appearances and did not release a new Christmas album (EMI brought out a compilation album). They spent four months in the Abbey Road studio developing new ideas with their recording manager, George Martin. This smacks of the later behaviour of George Michael which, in his instance was a fundamental element of his fight against Sony. The Beatles changed their image from clean, neat black suits to 'hippie' flower-power and probably led fashion trends as much as they themselves were affected by them. This was a creative era during which they came up with the innovative *Sgt. Peppers Lonely Hearts Club Band*. Here then is evidence of their first great lifestyle shift. However, diagnosed as suffering from depression Brian Epstein died of a drugs overdose in August 1967. There is some speculation that a significant cause for his personal demise was the changing nature of The Beatles' life style, theirs no longer being compatible with his own. It is felt here that Epstein made a fundamental mistake on his own part, when he turned down an offer of £3.5 million for the contract to manage The Beatles. At the time John Lennon cautioned him "*The Beatles aren't for sale, Brian . . . if you sell us we won't work*". From the legal perspective it is speculated here that because of his financial standing and business background, if this relationship had come to litigation, Brian Epstein would have been perceived in court as being the stronger of the two bargaining parties. The Beatles would have been perceived as a naive group of flamboyant innocents. This series of events would have been contemporaneous with the *Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd*²⁷⁶ hearings, as to the possible outcome no further speculation would be sensible here.

Other examples of life style shifts include Gilbert O'Sullivan who had recently moved into his own house, away from the protective cover of Gordon Mill's bungalow and he had adjusted his stage outfits from exaggerated hats and short trousers to appear in more 'normal' clothing. George Michael wanted to switch from 'teeny-pop' pop idol to a more eclectic style of music and based a lot of his argument with Sony on his allegation that they would not support him in his projects.

Dressed in a black suit and his trade mark designer stubble, Michael said Sony had decided to teach him a lesson by “killing” his 1990 album ‘Listen Without Prejudice’ when he refused to market it with a video featuring himself. Michael, 30, felt that a video might derail his transition to an “adult-oriented artist.”²⁷⁷

Other artists, such as David Bowie, have made life style shifts integral to their career. So, of course not all artist or writer and executive relationships break down over life style shifts, each is dependent upon the artist’s or writer’s level of success, the current market for his product and the executive’s instinctive response to the shift as it occurs. Sometimes the shift will even be initiated by the executives. In either case, it is equally likely that the activities surrounding planning and preparation for substantial change will be buried in the day-to-day progress of the business in hand. From an outsider’s point of view this may make the shift appear sudden and impetuous, as if it is innovative and inspired by artistic flash. The truth is that there is rarely such an intense, inspirational moment in any form of creative work.²⁷⁸ These shifts are quite genuine, however, and can be distinguished from cases such as that of Robbie Williams²⁷⁹ where the artist simply became less and less capable of disguising character traits which had always prevailed but had been suppressed. A further distinction, in business terms, must be made between the type of long-term contractually based relationship being discussed here and long term builders’ or manufacturers’ relationships where personality is unlikely to affect the ongoing trade and where machine tooling and other forms of engineering constraint will necessarily force innovative acts to be planned in detail.

11:2 Destructiveness

While it must be made clear here that not all artists display destructiveness or have any such nature, there is scientific evidence²⁸⁰ that destructiveness is a common characteristic of those involved in creative work. This can mean a tendency toward self-destruction manifest through self-abuse. This behaviour is accepted to the point of tradition in the popular music industry and most commonly manifests via alcohol or substance abuse combined with general recklessness. Note that those executives who have been successful and who have habitually indulge or over indulge in stimulants and

behaviour-affecting substances, tend to be those who do not to outwardly display self-loathing or day-to-day fear of failure as this would negate their command for respect within their field of business. The most publicised forms of outwardly displayed destructive behaviour are those of artists such as the antics of Keith Moon of The Who, who was renowned for breaking up stage equipment, driving into swimming pools and causing damage to hotel suites. There are many instances of this type of behaviour reported in the popular and rock music industry press, details of which are not significant here.

What is significant is the calculated tolerance of this behaviour among corporate parties. To a certain degree it is a marketing tool and it is only beyond toleration when it damages the publicised public persona of the artist, and even then when there is no possibility of public forgiveness. Again, it must be noted that not *all* artists or writers have these characteristics. Some have more gentle mood swings, some operate with perfect mood stability and many have a more simple tendency toward melancholy, and that only when they are at work.²⁸¹

Prima facie these types of behavioural factor may be taken to go beyond the scope of contract law. However, if acceptable models for the scope of contract law are to develop to incorporate long-term, contract based relations, and it is proposed here that they should, then the doctrines of unconscionability, good faith and co-operation can be utilised. Reference has been made throughout this discourse to know drug addict Sean Ryder. His substance abuse habits had been established before he entered the music industry and were known to the Nicholls who, ten years after he was established, undertook to become his managers as the first leg of his recording career fell into decline. This relationship raises many questions regarding who holds what onus of *good faith, unconscionable behaviour* and there are a secondary series of questions regarding third party *undue influence* (extending to third party contractual rights) in connection with the facts to the *Ryder v Nicholls and Another*²⁸² case. For these reasons this case will shortly be used here to moot a test of the proposed hypothetical doctrine of unconscionably constructed contracts.

END NOTES

-
- ²⁷² Research includes: Tobler J. respected music industry Journalist; Angel N. music industry solicitor (Ritz Records, Take That etc) Stinson A., Harbottle & Lewis (originally representatives at the Fleetwood Mac case); Bill Gatzimos, industry lawyer/manager, Nashville Tenn.
- ²⁷³ *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816; *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901
- ²⁷⁴ Artistic creation is not impetuous by nature but creative people, while they keep the scope of their working environment in order to be able to grasp and develop new productions have a different mind-set to common business men and may often be destructive, impetuous and desirous of radical changes in their persona; settings from time to time. See Appendix 3, Albert Rothenberg M.D.; *Creativity & Madness*; The John Hopkins University Press
- ²⁷⁵ Sources: Tremlett G.; *Rock Gold, The Music Millionaires*; Unwin Hyman; 1990 PP 33-35; and personal interviews conducted amongst a variety of music industry executives and artists
- ²⁷⁶ [1965] 2 All ER 933; [1966] 1 All ER 725 [1967] 1 All ER 725 CA; [1968] AC 269 HL
- ²⁷⁷ *The Times* Saturday Magazine, October 30, 1993 ; p7
- ²⁷⁸ See Appendix 3, the conclusions of Albert Rothenberg, M.D.; *Creativity & Madness*; The John Hopkins University Press
- ²⁷⁹ Given at footnote 259; page 109 above
- ²⁸⁰ Rothenberg A, M.D.; *Creativity & Madness*; The John Hopkins University Press; Chapters 6 & 12
- ²⁸¹ Thus the capability to satisfy the potential market with material covering emotive topics such as heartbreak, lost love, loneliness, recovery from any one of the afore mentioned political protest or social statement. Of course some songs are quite jolly and are aimed simply at inspiring dance or celebrating sexuality or marking joyous events - but even these are subject to intense emotion in the delivery.
- ²⁸² *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816; *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901

12: A Paradigm of The Artist – Built From Survey Responses and Interviews Combined With Information From Relevant Case Reports

The following is an analysis of the results of the questionnaire given to up and coming and would be artists and writers during the period September to October 1999. Accepting that the group who responded to questionnaires are a fair sample of ‘young’ rock and pop artists, they can now be described as predominately Myers-Briggs²⁸³ type E-N-F-P. It is felt that this personality trait analysis gives a credible method for establishing a) what type of people ‘young’ artists and writers are, and b) how best to approach and deal successfully with them. As well as Myers-Briggs, the work of Dr. David W. Keirsey²⁸⁴ commonly known as Keirsey Temperament typing, has been considered. However, Keirsey is less commonly referred to in the circles where this type of analysis was reviewed for this discourse and, it is felt here, seems to provide a less accurate portrait of the subjects. Overall Keirsey does not provide satisfactory material to give the basis for designing a best approach to bargaining and business-relationship building with the subjects. However, the Myers-Briggs Type Indicator (MBTI) matrix gives a more thorough, more commonly used set of results. More detailed information about the questionnaire used, Keirsey and Myers-Briggs Type Indicators is at Appendix 10.

The first task here is to explain the meaning of the statement that the group are predominantly ENFP:

E, Extroversion: this means that the majority of the group show a preference for drawing energy from their external environment, for example interacting with other people, taking part in activities and obtaining material possessions.

N, Intuition: this means that the majority of the group show a preference for taking in information through an intuitive sense such as gut reaction and have a tendency to notice what might be rather than what is actual.

F, Feeling: this means that the majority of the group show a preference for organising and structuring information so that they can reach a decision based on their personal values and judgements.

P, Perception: this means that the majority of the group show a preference for living spontaneous, flexible lifestyles.

The opposing alternatives are:

I, Introversion: which indicates people who have a preference for drawing energy from their own thoughts and emotions. The group showed only a 31.25% I tendency.

S, Sensing: which indicates people who have a preference for taking information through the five senses and have a tendency to notice what is actual. The group showed only a 39.69% S tendency

T, Thinking: which indicates people who have a preference for organising and structuring information so that they can make decisions in a logical, objective manner. The group showed a 43.44% T tendency.

J, Judgement: which indicates people who have a preference for living planned and very organised lives. The Group showed a 44.69% J tendency.

12:1 Questionnaire Analysis Results

The next task here is to compare the questionnaire responses with MBTI traits and to review MBTI advice. Those answers which have been singled out are the majority of those where 75% or more of the group gave the same response.

Q3: Is it worse A) To have your head in the clouds, or B) To be in a rut?

87.5% said that it is worse to be in a rut.

MBTI suggests that ENFPs live in a world of exciting possibilities, the details of everyday life are seen as trivial drudgery. They place no importance on detailed, maintenance type tasks and will frequently remain oblivious to them. They tend to become unhappy when they are confined to strict schedules or mundane tasks. Consequently, ENFPs work better when they are in a flexible environment working with people and ideas. Many ENFPs go in to business for themselves and they have the ability to be very productive as long as they are excited about what they are doing. The “head in the clouds” concept can be equated to that trait shown by all of the artists and writers who have approached or entered in to litigation as discussed above in that they are each described as being averse to business matters. This trait is explained either because of age and experience such as with Gilbert O’Sullivan²⁸⁵ who at 23 years old was described by the Court of Appeal as a young man. Despite his prior contractual relationships in the industry was implied to be naïve in connection with business matters, however a different reading of this case can lead to the impression that

O'Sullivan was more inclined to concentrate on his ambitions as a singer songwriter and leave the business matters to his manager/advisor Gordon Mills. Notably, when O'Sullivan became unhappy with the arrangements he consulted solicitors. Similarly The writers McVie and Welsh from Fleetwood Mac²⁸⁶ who brought a case against their publisher/managers and Sean Ryder²⁸⁷ whose managers brought a case against him, were well known for their substance abuse and generally casual lifestyle. Thorpe L.J. referred directly to Ryder' background in the opening paragraph of his judgement saying

. . . he had a bad reputation in the music industry partly because of his drug abuse and partly because of his behaviour.

Describing the relevant members of Fleetwood Mac Lord Denning said

*They were composers talented in music and song but not in business. In negotiation they could not hold their own. That is why they needed a manger.*²⁸⁸

Similarly, Tony Macaulay²⁸⁹ was described as young and inept in matters of business, again despite the fact that he had had prior business and contract negotiation experience and a clear idea of his ideals and ambitions. Inclusive of George Michael²⁹⁰ it is felt it can be said here that not only do the subjects prefer to keep their head in the clouds as far as their business conduct is concerned but it is quite probable that the description of 'being in a rut' was a key component in the decision to initiate litigation.

Q:8 At Parties do you – A) Stay late and gather increasing energy, or B) Leave early feeling yourself running out of energy?

93.3% said that they stay late and gather increasing energy.

Q36: Do new and unexpected meetings with strangers A) Stimulate and energise you, or B) Tax your reserves?

86.67% said that new and unexpected meetings with strangers stimulate and energise them.

MBTI confirms that ENFPs are enthusiastic, energetic and can get very excited. They are emotionally highly charged, having a strong need to be liked and are generally well liked because they are able to intuitively understand a person with whom they have close contact.

Q9: Are you more attracted to A) Sensible people, or B) Imaginative people?

80% said that they are more attracted to imaginative people.

MBTI suggests in general that individuals in their business environment will be more comfortable with those who have similar interests and perspectives as opposing characteristics require a motivated and patient approach.

Q10: Are you more attracted to A) What is actual, or B) What is possible?

86.67% said that they are more attracted to what is possible.

MBTI suggests that members of this group are typically bright and full of potential. They live in the world of possibilities, and can become unusually passionate about ideas.

Q11: In judging others are you more swayed by A) Laws than circumstances, or B)

Circumstances than laws?

93% said that they are more swayed by circumstances than laws.

Q44: Do you go more by A) Facts, or B) Principles?

75% said they go more by principles than by facts.

It would appear that facts, along with minutiae and detail do not attract the attention of this group. MBTI suggests that ENFPs are able to see meaning in everything and have and uphold strong values. However they continuously adapt these values so that they can walk in step with what they believe is right.

Q14: Does it bother you more to have things A) Incomplete, or B) Complete?

86.67% said that it bothered them more to have things incomplete

MBTI states that ENFPs are project oriented but that they have a need to focus on following through. When they become excited about a new possibility they may drop the project in hand and risk not achieving a great accomplishment.

Q16: In doing ordinary things are you more likely to A) Do it the usual way, or B) Do it your own way?

81.25% said that they are more likely to do ordinary thing their own way rather than the usual way.

MBTI confirms that ENFPs have a strong need to be independent and will resist being controlled or labelled, although they will not attempt to control others as their dislike of suppression is absolute.

Q24: Are visionaries A) Somewhat annoying, or B) Rather fascinating?

75% said that they find visionaries rather fascinating.

MBTI suggests that ENFPs are inspirers which in turn would suggest a dependency on there being visionaries to inspire.

Q29: In company do you A) Initiate conversation, or B) Wait to be approached?

75% said that in company they will wait to be approached rather than initiate conversation.

Initially this response seemed surprising but MBTI suggests that a well centred ENFP will evaluate the immediate contact in order to maintain their self control and personal values. It might be supposed, here, that waiting to be approached can provide time for such evaluation. In addition, in connection with the answers to Qs 8 and 36, above, it can be conjectured that the reluctance shown here for making the first approach is related to a fear of being rejected and disliked.

Q38: Are you more likely to A) See how others are useful, or B) See how others see?

81.25% said that they are more likely to see how others see than see how others are useful.

Q66: Is it harder for you to A) Identify with others, or B) Utilise others?

78.6% said that it is harder for them to utilise others.

MBTI describes this group as exceptionally intuitive and as having the flexibility to relate to others at their own level. It is claimed that ENFPs can be successfully manipulative but that this is a trait which is adverse to their values and so they would want to relate to others rather than see how they could be useful.

In addition to those question singled out above, the following are both examples of majority agreement amongst those who completed the questionnaire and are satisfactorily compliant with MBTI casting. While this may be something of a bland list it is considered critical to evidence the relevant personality traits of those who are likely to become or are just recently bound in long-term music industry contracts. 67% said that they tend to be more spontaneous than deliberate. Only 53% said that they prefer clarity of reasoning to strength of compassion. 71% said that they tend to be more whimsical than routinised. There was a 50/50 split about whether the structured and scheduled is more appealing than the unstructured and unscheduled. Only 53.33% said that they prize a strong sense of reality more than a vivid imagination. 57.14% said that in relationships most things should be renegotiable rather than random and circumstantial. Only 40% said that it is preferable to make sure that things are arranged than to just let things happen. 60% said that they are more comfortable after a decision than before a decision. 71.43% said that they are more inclined to be fair-minded than sympathetic. Only 53% are more likely to trust experience than to trust a hunch. 62.5% claim to be more satisfied while discussing an issue thoroughly than when an agreement has been reached. 56.25% feel more comfortable with feelings rather than standards when making decisions. Only 53.34% put more value on the definite than the open ended. There was a 50/50 split between those who considered themselves a practical person and those who considered themselves a fanciful person. 60% consider it worse to be unjust than merciless. 62.5% prefer to be in the state of having the option to buy rather than having purchased. 53.34% prefer consistency of thought to harmonious relationships. 68.75% consider themselves more easy-going than serious and determined. 53.34% make decisions somewhat impulsively rather than carefully. In approaching others 66.67% tend to be more personal than objective. 56.25% claim to be more realistic than speculative. 56.25% claim to be more drawn towards the convincing than the touching.

END NOTES

²⁸³ See Appendix 4 for further description of Myers-Briggs type indicators

²⁸⁴ *Ibid.*

²⁸⁵ *O'Sullivan v Management Agency and Music Ltd* [1985] Q.B. 428

²⁸⁶ *Clifford Davies Management Ltd. v WEA Records Ltd and Another* [1975] All E R 237

²⁸⁷ *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816; *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901

²⁸⁸ *Clifford Davies Management Ltd. v WEA Records Ltd and Another* [1975] All E R 237 at 240h

²⁸⁹ *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616

²⁹⁰ *Panayiotou v Sony* [1994] EMLR 229; *The Times* June 30 (1994)

13: The Potential Impact if Law Continues to Evade the Industry Mind Set

It is interesting to note that George Michael was the first singer/artist in the UK to attempt to avoid his *recording* contract through the High Court.²⁹¹ If he had won his case, that in itself with the surrounding publicity, just as much as a hearing at the House of Lords, might have substantially altered the formation of exclusive relationships of this nature. The George Michael case, and the published discussions surrounding it, serve to demonstrate a generalised illustration of music industry attitudes to the law as it is perceived. In addition this case is one which shows the law in operation in this field twenty years after *Macaulay v A Schroeder Music Publishing Co.*²⁹²

However, the point to be made at this juncture is that the industry appears to be open to receive guidance or governance. In this instance it seemed expected that the case would force some substantial element of change on behavioural patterns. The case had the capacity to undermine the investment levels which record and publishing companies are (generally) prepared to sink into the promotion of an artist before they expect his success to bring pay-back. It also had the potential to impact on the drafting of options clauses and the management of renegotiation throughout long-term relationships. These suggestions are supported through articles like that of Melinda Wittstock, published in *The Times Magazine*.²⁹³

What began three years ago as a personal row between the moody mega-star and the grey suits of Sony Corporation, one of the world's largest entertainment and consumer electronics companies, has become a test case that threatens to alter forever the record business' future composition.

Although the industry awaited the outcome of this case, the outcome did not inspire any great substantial change in industry practices after all. The only evident change of any significance has been that since the case it is possible to state that the major record companies have reduced the options clauses in their standardised contracts so that an artiste is obliged to produce five albums rather than ten within the fixed term duration period. It is now probable that an artist in interview, rather than stating excitedly that he "has got a record deal", is more likely state that he has "got a five album deal", although the tone of excitement is not reduced. The significance of the tone of excitement is that it is this element of the relationship which, in many cases, betrays the still naïve

approach of the artist and the lack of forward thinking which he has brought to the relationship. All that matters to these artists in the instant is that the contractual relationship has been created.

Modern media communications are strongly influential and *Panayiotou v Sony* represented a great opportunity to set new precedent and effectively dictate new behavioural procedure to the music industry. Had the case gone through appeal to the House of Lords there is even the possibility that Parker J's sensible approach would have been upheld, and that this would have reversed, or at least curtailed the progressive use of the ratio decidendi of *A Schroeder Music Publishing Co. Ltd. v Macaulay*. This is felt to be so because that 1974 case turned on the complexity of the contract, the difficulty in understanding its effects and the fact that it was a standard form, combined with the assumed naiveté in the nature of the artist/writer. All of these elements were felt to render the contract unfair in that the artist/writer was overpowered by it. The contract to which George Michael was, later, subject was also industry standard, the terms and clauses of were not dissimilar to those of the Schroeder/Macaulay contract with reference to complexity, duration, options etc. Macaulay had been contractually active and had negotiated some of the terms of his contract with the Schroeders, although not to the extent that George Michael had done with his recording company.

If it had been in place, clear legal governance could have brought support to the efforts of artists, writers, recording and publishing companies (or of their advisors) to build profitable, *flexible* relationships. One comparatively recent change in behaviour is that more often than not since the 1980s, common practice ensures that independent advice is sought by the artist or writer before 'signing'.²⁹⁴ Even so, what has the industry learned? Why, as a general rule, do artists' representatives or solicitors not intervene in a more constructive manner at the earliest stages? In discussing the formation of contracts between artists and record companies, Osbourne, Greenfield & Boon²⁹⁵ revealed (through focus research with music industry solicitors) that time-pressure exerted by the record/publishing company is a major force rushing inexperienced artists into only partially negotiated contracts. A sense of urgency is invoked in order to get the first recorded release to the market in time for some key marketing event such as Christmas, or to coincide with a printing or advertising deadline. The artist/writer may

also, according to that research, show a tendency to develop a driving fear of being 'left on the shelf' if he does not sign the contract quickly. He does not feel protected in his ambitions during the time taken to negotiate properly.

The industry as a whole and the independent advisors (lawyers) have developed a tendency to assume that once the relationship is underway and signs of success exposed, renegotiation or litigation will rectify unsatisfactory terms. This is not good practice. It is deceitful towards the judiciary and it is a bad form of societal relationship with law.

END NOTES

²⁹¹ Parsons T; *Talks to George Michael*; Daily Mirror; January 3rd 1996; pp16-17

²⁹² For further detailed analysis see p 130 et. Seq.

²⁹³ *Loosing Faith*; October 2nd 1993

²⁹⁴ Personal interview with established music industry solicitors support this statement. Also, see Greenfield S., Osborn G., & Boon A.; *Complete Control: Judicial and Practical Approaches to Commercial Contracts*; International Journal of the Sociology of Law, (Law and Popular Culture Issue). 1996 Vol. 84 pp 89 et seq.

²⁹⁵ *ibid.*

14: The Principle and Operation of the Hypothetical Doctrine of Unconscionably Constructed Contracts

As given on page 35 above, the general principles intended under the hypothetical doctrine are:

2:1 General

2:1:1) To influence behaviour and provide an aid to expectation management between those entering into long-term contractual relationships in the music industry

2:1:2) To provide substantive tests to establish whether a contractual dispute has as its root cause unconscionable construction of the contract

2:1:3) To provide guidance toward the remedy of such a dispute as might be identified at 2:3:4, but not to dictate quantum or other individual, measurable remedies

By drawing together the information and historical evidence selected for this research it is now proposed to moot-test the hypothetical doctrine against the facts of the two most recent cases pertinent to this area of study.

14:1 George Michael, Personal Characteristics and Career Building

In 1981 Georgios Kyriacos Panayiotou (George Michael) was an overweight, north London teenager, with a ‘craving’ for fame.²⁹⁶ That year saw the beginning of his ‘dizzying success’ as half of the pop music duo ‘Wham!’. By 1988, aged 25, he was working solo as one of the world’s most successful artists. By 1990 he was living as a virtual recluse in a £12million home in Hampstead.

To all intents and purposes George Michael’s public persona is that of an extrovert character with an eye to the future and with confidence and capability to initiate and realise plans. “When I was about nine,” he is reported as having said,²⁹⁷ “I realised that I dominated the people I went around with”. In court²⁹⁸ Parker J. described him as

. . . both intelligent and articulate. . . refreshingly candid. . . has a distinctly independent cast of mind. . . very much his own man.

Strong determination is evident when it is considered that through 1982 George and his musical partner Andrew Ridgeley (Collectively *Wham!*) had initiated their pop career by touting self-penned, self-recorded songs around the major record companies where they sometimes, apparently, gained an ear by pretending that they already had an appointment with an executive. As a result of this activity, confidence, drive and demanding they were introduced to ex Phonogram employee Mark Dean who had established an independent recording company, Inner Vision, which had the market place benefit of a prestige distribution deal through industry major, CBS. With the help and advice of his solicitor Robert Allen George Michael negotiated to have 'artistic control' of the duo's output so that he became contractually responsible for writing or selecting their songs and co-producing their recordings. He displayed a high degree of understanding of marketing and the market place within which he was now working,

. . . we were out and out pop . . . We didn't want to be subversive in any sense. We wanted to be huge stars. I knew I could do it. I knew I had the capability, craftwise, to put us ahead of groups like Duran Duran and Culture Club, so I just went for it.

However, while this initiation gives the appearance of a young artist with plenty of confidence and communications capability, by the end of 1983 Wham!'s lawyer had informed Inner Vision that the duo wanted to be released from their recording contract, the relationship between Wham! and Mark Dean having soured. The claim put forward was that the contract was restrictive. Parker J. gives a brief resume²⁹⁹ and states:

. . . Mr Michael, who considered that he and Mr Ridgeley had been very badly and dishonestly treated by Mr Dean, had decided that he wanted to get out of the Inner Vision agreement and sign with a 'major':³⁰⁰

In fact in March 1984 that dispute was resolved and the contractual challenge compromised when the duo was transferred to CBS subsidiary label Epic. This achieved a significant career move as Epic was, for example, the label through which The Jacksons and other similarly established artists were released. Although Wham! were, naturally at this stage in their career, signed to the UK office of the company rather than the more significant US office. By this time George Michael had secured the services of hardened negotiator and music industry solicitor, Tony Russell. This

choice of relationship in itself may be another indicator of the strength of character of George Michael.

Both as a member of Wham! and as a solo singer George Michael, the product, was one of the most successful in the industry. The 1984, CBS/Epic contract provided for one album with a series of seven options, so it was an eight-album deal.³⁰¹ The first contractual option was exercised in 1985 but in 1986 the duo split up and CBS Epic exercised their *leaving member* clause so that George Michael and Andrew Ridgeley were each subject to the original terms of the 1984 agreement. This *leaving member* clause has come in to common usage within record industry standardised contracts because of the possibility of significant individuals wishing to leave either bands or duos during commercially successful periods.

Following the four million sales of his solo album *Faith*, during 1987, George Michael was in a position to renegotiate the terms of his contractual relationship with CBS Epic and a renewed version was signed in January 1988. During the 1994 dispute, President of Sony Music Entertainment Europe, Paul Russell, talked about George Michael's attendance at a sales convention in Vancouver where a number of tracks from the yet to be released album 'Faith' were promoted:

The value of [Mr Michael's] appearance was enormous, both in assisting [his] cause in the negotiations and in creating huge goodwill between [him] and the various marketing and sales teams throughout the world who were set to work on his album when it was released.

There are several elements here which continue to suggest commercial confidence and market understanding as well as good communications capabilities on the part of the artist. Although he had highly experienced advisory lawyers working on his behalf, general reportage and case commentary strongly suggest that George Michael was dominant in managing the events of his own career.

14:2 Events Leading To Panayiotou v Sony [1994]

This discussion must focus on George Michael, as he was principal to the contract. It is acknowledged that his advisors were extremely influential to his opinions in certain

aspects of his record company relationships. Their conduct greatly influenced the course of events which constituted his business. The major event leading up to *Panayiotou v Sony [1994]*³⁰² was that while George Michael was negotiating the 1988 version of his CBS Epic Agreement, Sony Entertainment were already negotiating to take over CBS. The contractual relationship was, therefore, transferred, via the assignment option exercised by CBS in accordance with the contractual terms standardised in these types of contract. Proprietary rights in George Michael's output was passed from one record company to another without the artist having any recourse to affect this alteration in his business dealings. Prima facie, it must be said that the natural assumption in commercial and economic terms must be that such a take-over is designed to modernise, improve and stabilise the existing business, so that anybody trading or dealing with the company can expect to proceed with renewed vigour.

The resultant effect on George Michael's 1988 Agreement in combination with the Sony take-over was that: *a)* George would earn higher royalties from his output; *b)* the options had been increased by two albums with a fifteen year duration for the entire contract (i.e. there were eleven years now remaining, since the 1984 start, during which a total of ten more albums must be produced, accepted and marketed); and *c)* Sony now had a commitment to three albums, of which *Faith* was counted as the first, with options for five more albums to follow.

For the purpose of minimising tax liability, while he was on tour for the greater part of 1988, George Michael accepted accelerated payments against royalties from Sony of almost £11.5 million. While *Faith* topped the UK album charts and stayed on the chart for some seventy-two weeks as the result of several successful singles, in addition to which it stayed at the top of the US charts for twelve weeks, selling in excess of fourteen million copies, George's next album, *Listen Without Prejudice, Volume 1*, released in September 1990, sold just over five million copies.³⁰³ Much of the *Listen Without Prejudice* sales can be attributed directly to the work of the record company in honouring its part in the relationship.³⁰⁴ Album sales would have been considerably lower without marketing support and promotional activities on the part of the company as George Michael had, now he was in his mid 20s, developed a desire to align himself

to a narrower, more adult, rock oriented sector of the market. As a result of this decision he proceeded to remove any visual reference to himself from the promotional and marketing product accompanying his new releases, including videos. In his evidence during the later court case against Sony, George said:

*... I decided to remove my physical image from the marketing and promotion of my records, at least for the foreseeable future, hoping that in the long term I could reach an audience with whom I was comfortable . . .*³⁰⁵

Progress lead to the conclusion of further renegotiated terms between George and Sony in July 1990. For an artist of this calibre continued success will, it seems, continue the potential for on-going negotiation, the chief purpose of which is to increase royalty payments to the artist in reflection of his success. George Michael was conducting his business affairs with a significant degree of decision making and continuing confidence. At one juncture in court he had said:

*... Their offer certainly seemed better than the alternative, which was to remain with my existing terms. It was also at the back of my mind that I would be in a position to seek further improvements in the future if 'Faith' was a successful as seemed likely.*³⁰⁶

However, in February 1992 he took advice which suggested to him that he could contest the enforceability of this relationship with Sony on the basis that the 1988 version of his contract was in *restraint of trade*. His personal drive was toward an 'adult rock' market as described above, and George had become convinced that Sony did not give the fullness of support to his endeavours that he expected. (In the alternative, he was advised, that the agreement was in contravention of Article 85 of the EEC Treaty.³⁰⁷) Further details of this case have been reserved here for the purposes of moot-testing the hypothetical doctrine proposed as a result of this research.

14:3 The Onlooker's View of the Case From Sony's Perspective

Much of that material, legal, journalistic or academic, which is produced in respect of music industry cases of this nature, is focused on the perspective of the artist or writer. An impression of the pattern for presentation suggests that the artist is the focal object. He will be described and his hopes and aspirations examined and expressed to the extent

that they can be interpreted or understood (this process is not always accurate but it is rarely damaging to the artist). This is generally followed by an account of the opinion of the judiciary (where they have been involved) of that artist or writer and then of how the company (recording or publishing etc) measures up in its treatment of that artist. There may be two key and one consequential reason why the material is presented in this way: 1) That the artist or writer is generally the complainant so it is natural that attention is drawn to him first. 2) That the artist or writer is often more 'famous' and has a public persona so that those who seek to judge or observe can rapidly draw up at least a caricature whom they believe that they know and can describe. 3) That the development of concepts such as inequality of bargaining power, combined with a populist attitude to the music industry, drives the tendency to believe that the artist or writer is naïve and altruistic at heart while industry executives are perceived as greedy, sharp, capitalistic and usurious. So it is natural that sources of information in this area seem biased in terms of the weight of representative content.

The *Panayiotou v Sony* [1994]³⁰⁸ case was decided in favour of Sony, none the less subsequent articles and discussions tend to be about George Michael. The shame of this is that Sony provided a clarity of information through this case, which should might, for example, be considered as substance for negotiation and expression of intent during the formation of these types of contract in the future. To argue justification for the terms of fidelity, exclusivity and the potential longevity of Sony's contract Pollock QC described on behalf of the record company their commercial and relational desires: ³⁰⁹

- 1) The desire to sell as many records as possible
- 2) The desire to ensure that there is an even and adequate flow of product
- 3) The desire to be able to plan ahead
- 4) The desire to have available proven successful product for as long as possible
- 5) The desire and need to be able to compete on equal terms in an international environment against other record companies which have long term signings
- 6) The desire to be known for continued and high calibre releases by long term successful artists in order to maintain a reputation with customers, dealers and new, unsigned artists

- 7) The desire to maintain morale and enthusiasm amongst employees
- 8) The desire to need to recover investment made in a particular artist
- 9) The desire to make profit on that investment
- 10) The need to have available sufficient product to finance (a) losses on unsuccessful product, and (b) the fixed costs of the infrastructure (including overheads)
- 11) The desire to accumulate property rights as an asset

And

- 12) The desire to have a supply of successful product in the future at reasonable and practicable prices.

Part of Sony's mission statement is that it seeks to 'make dreams come true'. However, what is suddenly brought to the surface through the list given above is that Sony is a structured commercial entity with accounts to render and business plans to live out. Not all record, publishing, management or agency companies have the well-developed business structure that Sony commands, but market developments have dictated that fewer of them are single entrepreneurs or 'chancers' as would have been prevalent thirty years ago. Also technology and government intervention have had an impact on the way that even small businesses tend to be run in the present. All of this would suggest that a shift towards changing, for the purposes of clarity and business efficacy, the way contracts in this industry are negotiated and formed could be more readily embraced and coped with by those *prima facie* less flexible, fixed entity parties. New practices could be costed, planned in and scheduled with foresight by well managed corporations like Sony, keeping their own goals in mind and adjusting their targeted expectations. Accordingly, lesser companies would fall in to line with what would become industry standard. In the end economic gains would either be the same or greater than under present practices because the essential business would not be changed while the relationships which go to the core of the business would be more content. Sony has demonstrated that it has no fear of, and no need to fear exposing what it expects from its relationship with artists. At one time there was a sense that commercial activity in the industry was shielded from the artistic element as if one would be corrupted by exposure to the other.

It is speculated here that the long-gone era of *Payola* engendered a sense of secrecy within this industry. Such an ambience of subversion and the 'take it our way or leave it' attitude read in to industry contracts seems super-protective and power evoking to those who have chosen to build on that impression. Sony's modern, open, business based and marketing oriented attitude surely points the way to a new era, where relationship forming is concerned, but is a marker which has not been recognised. One reason for this is that current focus is on Sony's background and relationship with technology and hardware. They are seen as market place giants and there has been an assumption that they intentionally treat software and artists alike, as production line 'product'. Overall, this would not be good practice and it is felt here that it is unlikely to be a truism. It is an emotive rebuke to the new kids on the block and part of a natural pattern of resistance to change.

The general attitude of Sony is encapsulated by a statement released the day before the court case commenced: "We are saddened and surprised by the action George has taken against Sony Music UK. There is a serious moral as well as legal commitment attached to any contract and we will not only honour it, but vigorously defend it"³¹⁰ There is no evidence to suggest any emotional deceit in what is expressed here.

14:4 Panayioutou and Others v Sony Music Entertainment (UK) Ltd.³¹¹

Summary of events: In 1983, proceedings commenced against Inner Vision, over a contractual relationship which already existed. The purpose behind the dispute being to terminate the existing contract and form a new one with Inner Vision's distribution agent, also a record company, CBS. CBS was, of course, more substantial in the market place than Inner Vision. Wham! hoped from their action

*... for a declaration inter alia that the [preceding and concurrently terminated] Agreement was void and unenforceable as being unreasonable restraint of trade.*³¹²

The 1983 dispute was brought to an end by the termination of the Inner Vision Agreement and the formation of an agreement between the plaintiffs and CBS, the 1984 Agreement. The 1984 agreement both established the relationship between George

Michael and CBS, later to be taken over by Sony, and lay at the core of the judgements surrounding the 1994 dispute to be analysed here. In 1988 and again in 1990 the 1984 Agreement was renegotiated and the terms of remuneration were varied. In 1992 the Plaintiff, by then George Michael as a solo artist, was advised that it was open to him to contend that the 1988 agreement was an unreasonable restraint of trade due to *inequality of bargaining power* which allegedly affected the relationship in 1988. The 1984 Agreement was presumed, in this contention, to have been enforceable. [There is no intention here to consider or discuss the alternative pleading from this case, that the contract was void as being contrary to Article 85 of the EEC Treaty.]

Notwithstanding reports and reportage which surrounded this high profile case, judicial summary and advice handed down did not have the impact on the community that the judiciary might have hoped. As proof of this, following the George Michael case and all its surrounding publicity, in 1998 singer Shaun Ryder's advisor continued to advise his client to attempt to avoid his contract on the grounds that it was an unreasonable restraint of trade. Had the judicial and legal governance of the George Michael case been successful, surely Shaun Ryder's advisor would have given quite different advice, and indeed, have acted quite differently himself during that relationship. In concurrence with Parker J. it is felt strongly here that:

*It [is] difficult to see how exclusivity of exploitation arising by reason of the outright sale and transfer of copyright could be classified as a restraint at all. The sale and transfer of property rights was pre-eminently a matter of bargain and there was no public policy interest in preventing an outright sale of a property right.*³¹³

and . . .

*The duration of the Agreement was a function of success, in that it would only run the full course if the defendant (record company) exercised all its options, which would only occur if the [first] plaintiff continued to be successful.*³¹⁴

Analysing for restraint of trade *per se* is not an ideal approach to this relational problem. This suggestion is supported by evidence that restraint of trade is not a natural point for consideration to the mind of an artist in the day to day management of his lifestyle and

all that contributes to that. That evidence is given by George Michael in relation to the 1988 renegotiation of his contract with CBS:

*As in 1984, I did not ask for or receive any advice as to whether my amended agreement would be in 'restraint of trade'. I had no reason since 1984 to develop any understanding of that concept, and there was no reason now for the matter to cross my mind. In short, it did not occur to me to question the enforceability of my agreement. My dealings with CBS had by and large run smoothly. CBS had not tried to interfere artistically. My career had progressed as I and my record company had wanted it to progress.*³¹⁵

14:5 Testing the Hypothetical Doctrine

Q: How could the court have gone about establishing whether or not there was an *Unconscionably Constructed Contract*?

Clearly there is no question about whether the parties depended upon long-term, contractual relationships such as this one for their lifestyle, livelihood and business in accordance with item 2:2:1 above. But what evidence is there to show whether or not they came together in *good faith*, and was that *good faith* maintained during the relationship as it proceeded, in accordance with 2:3:4 ii) and iii). It is felt here that the first component of *good faith* must be *consensus ad idem*, a meeting of the minds. In order for there to be such a coming together there must be a full understanding of what the other party wants, needs and intends to achieve from the relationship. Because this particular Agreement arose out of a dispute, it is necessary to look to facts surrounding that dispute and see what intentions, on either part, can be demonstrated. George Michael and Andrew Ridgely felt that they were treated dishonestly by Mark Dean the representative of their former recording company. By 1983 this relationship had fallen into ruin and George Michael

*Had decided that he wanted to get out of the Inner Vision Agreement and sign with a 'major': a decision which was already in his mind [-]. He felt that Wham! Would be unlikely to have any success in the United States if they stayed with Inner Vision, and was looking for a legal reason to get out of the Inner vision Agreement.*³¹⁶

During the 1994 case under study here, witness and Plaintiff's solicitor, Mr Tony Russell, was asked whether, from an early stage in the 1983 dispute, it was his objective that there would be negotiation with CBS, the end result of which would be a deal between CBS and Wham!. He replied that that was absolutely correct.³¹⁷

Q: Have intentions and expectations of both parties been clear, understood and honoured?

There is no need to search deep for the intention of George Michael pertaining to the 1984 (and subsequent) Agreement. It was simply to enter into a long term relationship³¹⁸ with a suitably 'major' record company in order to increase the success of his career as an artist, at that time a member of Wham!, but later, as it transpired, in a solo capacity.

His further expectations, having achieved a long-term relationship with CBS/Sony included free artistic control in his work, which was already incorporated as part of his agreement with Inner Vision and which was honoured and carried forward to the agreement with CBS by clause 4.03.³¹⁹ Tony Russell gave evidence that this factor *dominated the early part of the negotiations* with CBS. It must be born in mind here that it is the intentions and expectations of George Michael which are to be considered here, and not, where that might occur, interpretation by his representatives of those intentions and expectations. The position of the representatives, advisors and other parties to the events under discussion will be discussed separately.³²⁰ Somewhat poignantly, one of the artist's strong contentions throughout his dispute with Sony was that he was treated like software.³²¹ George Michael felt the integrity of his expectations toward maintaining artistic control of his own productions was threatened. The acting out of this expectation was apparent in his decision in 1989, during a rest period, to alter his teeny-pop, public image. Thus he would be able to create and sell a style of music which he was coming to prefer, and which would narrow his audience to a more mature and select group. He was aware of the ongoing marketing implications this would raise with the record company, but he expected co-operation in compliance with clauses 4.05 and 13.01f of the Agreement.³²²

The record company's intentions and expectations from the agreement are clearly given at page 135 above. All of Sony's points, however commercial at heart, depend for success upon there being longevity of relationship between artist and company. In fact, in this case, during the 1987 renegotiations it was Tony Russell himself who proposed that CBS/Sony commit to four albums (six years at the average of one every eighteen months).³²³ It is an accepted part of the course of dealings within this industry³²⁴ that improved success demands improved royalty terms, which demand in return a commitment to further album production. However, at times of negotiation no thought is given to *duration* which surely negates the *restraint* argument as in this case.

During his determinations Parker J., as well as establishing whether the case attracted the doctrine of restraint of trade, was courteous enough to go so far as to apply the *Nordenfeldt* tests for reasonableness. In the event he found that there was no cause in this action for public policy restraint of trade³²⁵ (the *Macaulay*³²⁶ kind) and his analysis throughout supports what is felt here.

What is put forward here is that in 1992, just as in 1983, the artist desired to escape from his relationship and sought legal grounds to achieve this. From the facts it is felt that it was the integrity of the artist's artistic control which was sensitive, more important to him than any other matter, and which George felt to be threatened by the ongoing relationship with Sony. As already stated, when he was tied to CBS he felt that they did not interfere with his art.

*My dealings with CBS had by and large run smoothly. CBS had not tried to interfere artistically. My career had progressed as I and my record company had wanted it to progress.*³²⁷

There can be no doubt that the matter of artistic control was expressed throughout negotiations, nor that the artist's intentions were subsequently represented in the written contract. Further, when he felt that he had earned the right to expect higher royalties, the record company were content to enter into variation of the appropriate terms. So, in terms of *consensus ad idem*, it seems that the evidence supports that a fully understood agreement was reached at the formation stage, and was carried, through the written contract, throughout the relationship.

Q: Can it be said that *good faith* was at play and that all expectations and intentions were honoured for the duration of the relationship?

Good faith may not be restricted to the formation stage of a contractual relationship, but must incorporate the living-out of that relationship. This will include co-operation between the parties at such time as flexibility is required in their course of conduct. It will also, surely, look to whether or not expressed grievances and aggrieved opinions are footed in fairness and reasonableness. A rule such as this, which requires the parties to come together with 'all their cards (openly) on the table',³²⁸ must view the living-out of the contract as part of the contract. The cards 'cards must remain on display'. Throughout the life of the contract, it is thought here that CBS/Sony achieved this requirement, but that the George Michael party did not. While the principal, George Michael, did not indulge in malicious behaviour, he did accept badly considered advice which allowed the allegations of restraint of trade and of inequality of bargaining power. This is an act goes against the principle of *good faith* as it is interpreted here.

In this case Parker J. states:

I am fortified in the conclusion which I have reached by a consideration of the way in which the renegotiations proceeded in 1987 and in 1990. Thus, as I have found, the negotiations leading to the 1988 Agreement took place in good faith and on the footing that the 1984 Agreement was enforceable. The same situation obtained in the 1990 renegotiation, which took place on the footing that the 1988 Agreement was an enforceable agreement. As a result of the 1987 renegotiation and the 1990 renegotiation, Mr Michael obtained substantial commercial benefits. The fact that the terms renegotiated in 1987 and 1990 represented an improvement over his then current terms is demonstrated by the fact that Mr Michael elected to accept them.

Q: Does any part of the contract go against *public policy* or bring about terms which must be prevented from passing into common currency?

Firstly, some wisdom can be contrived from Browne-Wilkinson J. (at that time):

*. . . In my judgement a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience.*³²⁹

It cannot be said that the conduct or the contractual terms drawn up by CBS/Sony visited doubt on their conscience. Conversely, some of the intra-contractual behaviour of the George Michael party might have visited doubt on his conscience, an uncomfortable feeling indeed, and one which may have been seated at the core of his other doubts about Sony's support for his work. This is not enough, however, to undo the contract at law. Parker J. was concerned to ascertain public policy implications. He felt that this was an overriding principle and found evidence that it

*Underlies and is reflected in all the other statements of principle in Esso*³³⁰

The principle which Parker J. chose to examine in context is that which states that public policy will add support to the finding that a term in a contract is unreasonable (in restraint of trade or, indeed in any other respect).³³¹ In addition, there must be a balance between preventing the future currency of an unreasonable term and supporting the right of freedom to contract.

The question of *reasonableness* is a question in its own right and need not be inextricably linked with the complexity of deciding whether or not *restraint of trade* is in evidence.³³² In connection with the George Michael case it is felt here that it is not the written terms of the contract which go against reasonableness, but the lack of continued *good faith* as defined above, and the failure to attempt co-operation or flexibility between the parties. It is this behavioural pattern which is damaging to the public if long-term contractual parties are allowed to continue with it

In continuing to explore whether there was an *unconscionably constructed contract*, in terms of items 2:2:3 and 2:3:1 at page 35 above, the matter of *equality of bargaining power* at the time of negotiation is essential. Having grappled at some length to seek the proper application for *restraint of trade* in this case, the general faults and difficulties for which are examined at section 6 above, Parker J. turns his attention to establishing what relevance inequality of bargaining power can have in the context of the application of this doctrine. At first³³³ he finds that from the influential Esso³³⁴ case,

Lord Reid provides that even where the parties bargain on equal terms public policy may dictate that a harshly restrictive clause, even if they have been readily and freely accepted, should be enough to justify intervention at law.³³⁵ This Parker J. finds supported by Lord Morris of Borth y Gest³³⁶ and by Lord Pearce.³³⁷ This information is given to show that inequality of bargaining power is in the minds of the judiciary, and must remain prominent there. However, the extended principle that the contract itself must be able to stand a test of reasonableness to prevent it becoming the carrier of onerous practices into a business or trading community, has not been extracted to any stand alone status. Surely it is most clear from Parker J's determinations that the real issue for judicial consideration is the question of whether the contract is an *unconscionably constructed contract*. This, it is felt, is further demonstrated by the statement of Parker J.:

*In my judgement, [-], Mr Michael's state of mind cannot affect the objective existence or otherwise of inequality of bargaining power . . . Mr Michael was in a very strong negotiating position indeed.*³³⁸

Given all the re-negotiating that occurred throughout George Michael's career, it became obvious, as much to his own counsel as any one else,³³⁹ that there were no real grounds here to argue inequality of bargaining power. It was pleaded that, whether or not the 1984 Agreement was enforceable, Mr Michael:

Was not free of assumed or asserted contractual obligations, which at all material times it was in the power of Sony Music (then CBS UK) to release, when the [1984 Agreement] and the [1988 Agreement] were negotiated and concluded. Accordingly, the negotiation of those agreements was undertaken in circumstances of unequal bargaining power.

Parker J. interpreted this as meaning that:

*. . . there was inequality of bargaining power because at all material times he assumed (rightly or wrongly) that he was bound by the 1984 Agreement: that is to say, there was inequality of bargaining power because he believed that there was inequality of bargaining power.*³⁴⁰

As the record company contended, and is agreed with here, Parker J. took the view that from the outset of the 1984 Agreement between George Michael and CBS (later Sony) there was a continual relationship subject to amendments at 1988 and 1990, rather than

two or three distinct contractual terms. As Parker J. put it, to take any other view would be to allow *form to triumph over reason*.

Following this line of thought, Parker J. makes two comments which are taken as supportive to what is felt here, First:

*Thus, inequality of bargaining power may (depending on the facts of the particular case) be relevant to negative an argument to the effect that the covenantor (in all cases the artist) cannot complain that the terms of the contract are capable of being work unreasonably against him, since in entering into the contract he chose to repose a measure of confidence in the covenantee.*³⁴¹

This is interpreted to mean that it is the *relationship, the degree of trust and confidence which establish that relationship, and the continued honouring of that trust and confidence* which Parker J. finds to be relevant. This must surely harp back to the question of *consensus ad idem* and the critical presence of *good faith*, without which present, it could be argued, there is no contract at all because there can be no real 'agreement' in place. The scope of the doctrine of *unconscionably constructed contracts* must be broad enough to add that a mere signature to a long-term relationship will not be enough to force that relationship to be binding at law unless a high degree of recklessness is present in the act of signing, and that must be without the presence of undue influence.³⁴²

Parker J's. second comment shows the willingness of the court to recognise that there is a genuine grievance at hand and not to restrict any avenue which may be open to attend to the propriety of that grievance:

*As I see it, to recognise the existence of limits on the court's ability to inquire into and to take account of the background against which the contract was made and the circumstances in which it was negotiated would be to deny the 'rule of reason' referred to by Lord Wilberforce.*³⁴³ *What weight (if any) is to be attached to any particular factor or circumstance will of course depend on the facts of each particular case, but a blinkered approach would to my mind be entirely inconsistent with the approach required by the 'rule of reason'.*³⁴⁴

Genuine *inequality of bargaining power*, where it occurs, is a question of *substantive unconscionability*³⁴⁵ and, as such, has little relevance to the structure of the hypothetical doctrine of *unconscionably constructed contracts*. This is because it is not necessarily an issue concerned with the conduct of long-term contractual relationships. However, that is not to suggest that where there is an unreasonable and damaging contract in circulation, to which one party has been unreasonably induced, that it should not be arrested in the name of public policy and ceased from further incorporation, for the sake of public protection.

Q: At the stage of formation, on the evidence provided in this case, can this contract can be asserted to have been an *unconscionably constructed contract*?

In short, the answer here is no! Both sides were fairly represented and advised. The artist had clear intentions and expectations based on experience. The intentions and expectations of both parties were expressed and understood by each other at negotiation and formation. The latter, to such an extent that an artistic control clause was incorporated (unusual at such an early, unproven, stage of an artists career). Given all the above, there seems to be little or nothing to support the suggestion that, at the stage of formation, this was an *unconscionably constructed contract*.

The examination must turn, then, to the conduct of the ongoing relationship. The test of the hypothetical doctrine would suggest that the next area for scrutiny is the play of the advisors, particularly insofar as George Michael is concerned. This is done with the key point in mind that it was George Michael and not his representatives who was bound to carry on his lifestyle and living within the confines of this relationship. From the outset of this line of examination there are two important factors. The one is that George Michael felt that he contributed a great deal to the decision making and direction of his own career. He was in no way naïve or incapable in business terms, especially by 1984 when he had some considerable experience of the music industry and had formed his own realistic ideas about his career ambitions. On the other hand his representatives, Mr. Tony Russell, his solicitor and Mr Rob Kahane, his Manager, were strong and demonstrative personalities who often, generally not incorrectly, undertook to speak on

George Michael's behalf. Character assessments have been provided³⁴⁶ so that of Tony Russell, Parker J. says:

[He] is a solicitor of great experience in the record industry, with a reputation as an extremely tough negotiator. . .

He also found it necessary to say:

. . . I regard his recollection of events [as] unreliable, due no doubt to the passage of time coupled with the pressures of litigation and the fierce loyalty which he clearly feels towards his client.

The judge's comments about Rob Kahane, however, may be more significant toward consideration of the conduct of the parties relationship as a whole. The nature of such a relationship, when viewed from the outside, must be coloured by the characteristics displayed by those involved in it, so that judgements of that relationship must be made with due precaution.

I found Mr Kahane to be a thoroughly unreliable and untrustworthy witness.
and

In the first place his evidence was coloured to a significant extent by his obvious and intense dislike of Sony and all its works. It may be that this dislike derives from the poor personal relationship which, regrettably, appears to exist between him and Mr. Jenner, the head of the 'Columbia' label at Sony US. . .

In the second place, in giving his evidence I found him motivated to an unacceptable degree by self-interest and a desire to protect his own position: characteristics which he also manifest in the course of events leading to the present dispute

The judicial assessment of George Michael was that he was:

. . . intelligent and articulate, and he gave his evidence with clarity and conviction. To say that he was not overawed by the formalities of the proceedings may be something of an understatement, but his evidence was certainly none the worse for that. He was refreshingly candid, and I have no doubt at all that in giving his evidence he was doing his best to do so fairly and honestly. . .

. . . That said, however, an opinion, however honestly held, is only as reliable as the facts upon which it is based – and where the facts are reported, the validity of the opinion depends (among other things) on the accuracy of the report and on the integrity and impartiality of the reporter. As Mr. Michael gave his evidence, it became progressively more apparent that his views of Sony's attitudes, motives and competence derived less from first hand experience and knowledge on his part than from reports made and views expressed to him by his closest advisers, and particularly by his manager Mr. Rob Kahane.

That is not to say that Mr. Michael's opinions were not his own: that would be to underestimate him. . .

And quoting from the cross examination between Pollock QC and George Michael, Parker J. provides:

Q: . . . Is this a fair comment, that most of your complaints against CBS throughout the period of your relationship with them . . . are based on what you have been told by others in your entourage . . .

A: Yes absolutely. I have relatively little contact with executives in comparison to my managers, which is normal for an artist of my type.

At the conclusion of this assessment Parker J. sates that

I have no doubt that since Mr. Kahane came on the scene as his manager in 1986 Mr Michael's attitudes to and opinions of Sony, and his suspicions as to Sony's motives, owe far more to Mr. Kahane's input than Mr Michael can have realised when these proceedings began.

Finally, about Mr Paul Russell, President of Sony Music Entertainment, Europe (and previously legal representative for the record company) Parker J. felt:

Mr Paul Russell possess a very much more phlegmatic temperament that does Mr Tony Russell. He displayed considerable patience. . .

. . . I am satisfied that throughout his evidence Mr Paul Russell was doing his best to give his evidence fairly and honestly and generally to assist the court to the best of his recollection

Having accepted these assessments, full consideration can be given to the part played by the independent advisors. This must be done if a judgement is to be made about whether or not there is an *unconscionably constructed contract*.

Firstly it may be commented that the implementation of item 2:5:2, i.e.

The initial Agreement should incorporate a quasi-contract which imposes on the Advisor an obligation to ensure that (a) he is acting in the best interests of the principle party whom he represents and (b) that he will not issue any advice or cause to be incorporated any term or condition which has as its purpose the effect of damaging or reducing the expectations of either principal beyond what is reasonable³⁴⁷

could play an important role in relationships like that between George Michael and his record company. For example, the adoption of this policy might check the influences offered by parties such as Rob Kahane. In any event it is capable of putting the onus upon intervening third parties to take responsibility for the results of such influences and inducements as they might engender. However, given the circumstances which obtained, the following evidences must be examined in their more original context.

In 1983 Tony Russell had counsel (Mr Cran) prepare a nineteen page letter which suggested that the agreement between Wham! and Inner Vision was void or voidable.³⁴⁸

In evidence during the 1994 case, Tony Russell told Parker J. that his aim was

. . . to negotiate the release of Wham! from the Inner Vision Agreement and to sign Wham! direct to CBS (UK). To that end, on the same day [-] he telephoned a Mr Oberstein (of CBS) and Mr Rodwell (Inner Vision's solicitor), notified them of the terms of the letter [-], and expressed the hope, off the record, that it might be possible to negotiate a new deal direct with CBS (UK). . .

As previously stated here, the impetus for this act was that George Michael no longer wished to continue his relationship with Inner Vision and he did want to enter a relationship with a more substantial record company for the sake of his career development. However, it is made clear through this case that Tony Russell carried out negotiation tactics in whatever manner seemed most appropriate to him. In addition, it

was not the principal to the contract, George Michael who manipulated the event in this respect.

The impetus, desire and purpose which led to the 1988 renegotiation was that George Michael wanted to be elevated to what is termed 'superstar' status, although he wanted to continue his relationship with CBS. In essence this would be achieved by improving the terms of remuneration, extending the artistic liberty of the artist, and assuring him that his output would have full marketing support and promotional expenditure from the record company. George felt that, to achieve this, it would be necessary to shift the office where the Agreement lay from the UK to the US where the majority of music industry 'superstars' were contracted. This was clearly a move toward further improving George's market position in the US, such a development as was his expressed intention from the outset. The following course of events, as reported,³⁴⁹ reads something like a French farce. Over a period of time various individuals, including Rob Kahane and Tony Russell, travelled to or wrote to or telephoned, parties in the US, holding discussions with a string of influential individuals including CBS Chairman and C.E.O. Walter Yetnikoff and highly influential American lawyer Allen Grubman who was, at that time a close associate of Mr. Yetnikoff, whilst at contemporaneous meetings with CBS' UK offices denying or altering accounts of arrangements they were intending to enter on George Michael's behalf. It is not possible to ascertain the exact truth of all negotiation related events from the evidence, except inasmuch as that, during these periods, George Michael's representatives were selective with the truth and did not share with all parties their full knowledge of circumstances which obtained at any one time. This fact is only partially mitigated by their obvious drive to achieve what George wanted, namely 'Superstar' contract terms with CBS (US). Obviously while they carried on it was necessary for them to continue to cosset and protect the relationship with CBS(UK) incase they could not achieve what they wanted elsewhere. The evidence suggests that George Michael himself was not fully aware of the exact activities or outcomes of his representatives own doing during this time. Given the complexity generated by the variety of negotiations and the amount of information which appeared to have been withheld between those involved, it is not surprising that George said in court

My response was one of disappointment, given the expectation generated [by Mr Grubman. . .]. . . .

However, concerned not to antagonise Walter Yetnikoff, George accepted the terms CBS had offered and the contract was signed in January at the same time as Sony took over from CBS. Various clauses were included, in particular Clause 2.01, 2.02(a) and 2.02(b) which provided for the relevant sale, transfers and assignments to Sony Music.

There is some value in pointing out at this stage that the representatives under discussion here constitute what the law accepts as *independent advisors*. It has become clear that, in the music industry, this is often a contradictory title even for lawyers as they take a far more involved role in the maintenance of the relationship than the suggestion at law supposes of them. Because of this it has been suggested here,³⁵⁰ that it would be an improvement if due legal responsibility could be apportioned to these *advisors*, in their capacity as secondary parties to the chief contract. Thus the period of continuator activities mentioned above would have been able to give rise to reasonable grounds for a claim on the part of both principal parties, that this contract, as presented to the court is an *unconscionably constructed contract*. This argument necessitates a view of the contract in its entirety which must incorporate that it is an ongoing relationship, so that entirety includes all contractually relevant activities at all times. This principle is founded (as before) on the premise that there must be *consensus ad idem*, that is an *agreement* between the parties, all the terms and conditions of which must be known to each. Where there are intervening bodies acting independently on the principal parties' behalf, a mere signature, surely, should not be taken as proof in law of knowledge of all that has been put in to building that agreement. So far as it is understood here, if the position of the advisors is viewed as having extended to become that of an *agent*, in legal terms, then they would carry not only a fiduciary duty to the principal, but also, it is possible that they may be subject to an obligation to indemnify the principal against liability incurred by reason of the agent's negligence in doing what he has been commissioned to do. To date the status of music industry lawyers has remained strictly independent but the *Shaun Ryder*³⁵¹ case, as discussed shortly, may indicate a shift from this.

The degree of intervention in the performance of the living out of the long-term contractual relationship may be illustrated by the next sequence of events drawn from this case. George informed his representatives/advisors in February 1990 of his intention to withdraw from all publicity for his forthcoming album so that his 'pop' image could be withdrawn and replaced over time by a more adult rock persona. Meetings were held between the representatives/advisors and Sony with the intention of preparing for a variation to further improve George's royalty rights. These meetings took place in February, March, April and May 1990.

*. . . at no time during this stage in the negotiations was any mention made to Sony Music of any intention on Mr Michael's part to change the nature of his promotional activities in relation to future albums.*³⁵²

At the end of June 1990 the negotiations were concluded between Tony Russell and Sylvia Coleman, Director of Corporate Affairs for Sony Music and appropriate signatures were exchanged.

*Still no indication had been given by Mr Michael's side of any change of plan by Mr Michael in relation to his promotional activities . . .*³⁵³

There follows evidence of some confusion during July of that year as to exactly what Sony Music were told and what they understood. It was not, according to the reputable Mr Paul Russell, until October 1990, when he first learned of the full extent of Mr Michael's "change of direction".³⁵⁴ It can be suggested that it was at this juncture that the relationship between the principals began to break down, it can further be suggested that the root of the breakdown³⁵⁵ was a misunderstanding of expectations on each part coupled with the sudden change of management at Sony (US) which impacted on George Michael's sense of stability in the given circumstances. Here it could be said that it is clear that, due to the conduct of the representatives/advisors Sony were not in possession of all the facts pertaining to George Michael's planned course of progress. Additionally, George Michael was not aware that Sony were not fully informed of his decisions, at a time when that knowledge would have been critical to their performance.

In a letter, given as evidence, he wrote

. . . I was assured of a positive attitude from CBS Records on the current single and promotion of the album from now on.

Unfortunately the results of this new found spirit are nowhere to be seen
 And in another paragraph which betrays George's attitude to his still being assigned to
 Sony (UK) rather than Sony (US):

*. . . I am shocked by the lack of commitment (or perhaps competence), especially
 having done all I could this year in response to CBS UK's apparent desire to re-
 establish George Michael s a UK signing.*³⁵⁶

There is little doubt that, if armed in advance with full knowledge of George's plan for
 his "change in direction" CBS/Sony would surely have developed appropriate,
 innovative marketing tactics. This, after all was an artist who had previously sold over
 14 million on one album. Furthermore, evidence suggests that the artist was content
 with the reduced volume of sales on this new album, which indicates that his response
 was to a perceived attitude rather more than to factual events.

Item 2:4:9 above,³⁵⁷ recommends regular meetings at suitable intervals between the
 principals to long-term contractual relationship, and outlines a suggestion that these
 should be tabled to air grievances between them and agree any appropriate course of
 action with an option to wind down the relationship if no such agreement can be
 reached. It is felt here that *procedural unconscionability* can be extended to incorporate
 the procedures of living out long-term relationships of this nature, in which case it is at
 this juncture that the series of events can be said to have led to what amounts to an
unconscionably constructed contract. This means that the contract, while not frustrated
per se has become unsuitable for both parties to continue to live it out. Attendance at a
 2:4:9 type meeting could negate the necessity to apportion blame or lobby criticism,
 there is clearly no point in attempting to enforce a relationship when it has reached this
 stage and it can be said that there is loss of confidence on both sides. In fact, had a
 meeting been arranged it is possible that Sony, who had not lost all confidence, could
 have found a means to reassure George Michael and reinforce their relationship for the
 future. However, once an agreement to wind down has been reached it would remain
 with the parties (possibly in court but preferably on their own) to account for payments
 due and proprietary rights. This is a relationship which cannot cease in an instant,
 attempts to do that are invariably what have led to music industry litigation in the first
 place, however it is also the conduct of a series of business transactions. As businesses,

each in his own right, financial and proprietary accounting should not be the trigger for angst or undue harshness. It is felt that it is not part of this discussion to go any further in to pecuniary issues.

14:6 Summary of findings in respect of whether there was an *unconscionably constructed contract*:

In the early stages of considering an approach which could appropriately address the problems identified through this research one question commanded attention: *Is he equal to protecting himself?*³⁵⁸ The question may seem too broad - but it must be considered in context, and needs to be flanked by several others:

- (i) had he contracted in *good faith*?
- (ii) did his understanding of a *standard form* contract give rise to *reasonable expectations*?
- (iii) did he come to the contract *blinkered*?
(Needs, wants, cravings and ambitions are drivers that tend to have a '*blinkering*' effect)
- (iv) was he competent to negotiate with clarity in all the circumstances?

These test questions conform with Trebilcock's approach to being *informationally impaired*.³⁵⁹ Trebilcock also identifies what he calls a *Structurally Impaired Market*,³⁶⁰ by which he means a market imbalanced through control by an oligopoly or even a monopoly. On analysis, this description concurs with one view of the cause of inequality of bargaining power.³⁶¹ Such a market will not offer the flexibility in negotiation or choice of alternatives that a fully competitive market would. This certainly puts the aggrieved party at considerable disadvantage, possibly laying him open to duress, undue influence and restraining clauses of all types on a 'take-it-or-leave-it' basis.

However, and as Trebilcock himself points out, the music industry includes over 1200 record companies and almost a thousand publishing companies.³⁶² Managers and agents are really unquantifiable as any person or company may elect to take up these roles.

In addition to this mass of outlets, it must be recognised that many artists work independently, outside the system, and often make considerable sums in doing so.- For example one band³⁶³ produced and sold 1,800 albums 'on the road' in 1995, while comparable product, listed at about number 100 in the album charts was reported to have sold circa 1000 copies. The independent band accounted for some £12,000 - with no percentages to pay out. Thus it cannot be said of artists, or to some extent writers, that they are dealing in a restricted market place in the sense that Trebilcock outlines. Furthermore, Parker J. in his exploration of the standard form, monopoly/oligopoly, take-it-or-leave-it argument found that

*Although, as the BPI statistics show, the five majors (that is to say Sony, EMI, Warner Brothers, Polygram and BMG) dominate the market in terms of volume of product sold, it would be a mistake to suppose that the majors are not at the sharp end of competition. They compete vigorously with each other and with the 'independents'. . .*³⁶⁴

and

*. . . [on] the alleged factor that majors do not substantially compete with each other in the terms of their standard contracts, or their royalty rates . . .*³⁶⁵

*. . . I am satisfied that comparably between the financial rewards offered to artists by different majors reflects the action of market forces. That is to say, far from demonstrating a lack of competition between the majors, it is the product of competition.*³⁶⁶

In terms of the levels of negotiation Parker J. found that :

*Renegotiation of a recording contract after an artist has had a successful album is commonplace.*³⁶⁷

and in his opinion (agreed here)

*In a renegotiation an artist cannot expect to be treated in exactly the same way as he would be if he were negotiating on the open market free from any contractual ties. There is bound to be a degree of discount to reflect the fact that the artist is already bound by an existing recording agreement. . .*³⁶⁸

In conclusion, when the George Michael case is viewed as a paper contract with several incarnations, this is not an *unconscionably constructed contract*. However, if the eye of the law can be persuaded to look wider and view the living-out of the long-term relationship as an integral part of the contract itself, then, all facts being considered, this relationship does not pass the tests of *reasonableness*, *good faith*, or *intra-contract co-operation*. For those reasons it is felt here to be subjectively *procedurally unconscionable* and objectively of *unconscionable construction* and against the interests of *public policy* in its nature.

The recommendation here would be that the contractual relationship be wound up and account taken of the due apportionment of profits and gains. The proprietary rights in songs and material produced during the contract have been freely and willingly given up by the artist and he should maintain the right to future royalties which may be generated by those productions. The obligation to properly account for and pay all due royalties and other payments has been freely entered into by the record company and continuance of this in respect of future exposure as well as past and current sales would not impose hardship.

END NOTES

- ²⁹⁶ Times Magazine, October 2nd, 1993; p12
- ²⁹⁷ Betts G.; *Read Without Prejudice* "UFO Music Ltd.; 1997; p7
- ²⁹⁸ *Panayiotou v Sony* [1994] EMLR 229; at 252
- ²⁹⁹ *ibid.* at 254 – 255
- ³⁰⁰ *ibid.* at 255 A11
- ³⁰¹ This point is contested in court, see [1994] EMLR 229 at 262 A49
- ³⁰² *ibid.*
- ³⁰³ Figures derived from evidence [1994] EMLR 229; 283; A143
- ³⁰⁴ For the contention on this matter see [1994] EMLR 229; 282; A136 et seq.
- ³⁰⁵ *ibid.* at; 276; A100
- ³⁰⁶ *ibid.* at p 271; A86
- ³⁰⁷ This was a failed argument which is of no significance to this discussion at this juncture
- ³⁰⁸ *ibid.*
- ³⁰⁹ *ibid.* at p360 - 361
- ³¹⁰ The Sunday Times: Business; 4.7 17 October 1993
- ³¹¹ [1994] EMLR 229
- ³¹² *ibid.*; p 229
- ³¹³ *ibid.*; p 236; point 30
- ³¹⁴ *ibid.*; p 235; point 25. (c); and see also point 25 (a)
- ³¹⁵ *ibid.*; p271; A87; own emphasis
- ³¹⁶ *ibid.*; p 255; A11
- ³¹⁷ *ibid.*; p 256; A15
- ³¹⁸ *ibid.*; p 274 - 275; Anthony Pollock QC questioned George about his intentions and whether he saw this as a *long-term relationship*.
- ³¹⁹ *ibid.*; p 258; A28. Also see highlighted sentence in the quote given at fn 5 above, George attached much importance to the fact that *CBS had not tried to interfere artistically*. . .
- ³²⁰ See pp
- ³²¹ *ibid.*; See also the comments of ex Chairman and CEO for CBS, Walter Yetnikoff at Appendix 6
- ³²² *ibid.*; p 276 et seq.; from A100.
- ³²³ *ibid.*; p 263 A57 et seq.; and p 364 Para. 3
- ³²⁴ See the examination of the nature of the market and of recording contracts [1994] EMLR 229; p348 et. Seq.
- ³²⁵ *ibid.*; p347 para. 1
- ³²⁶ *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616
- ³²⁷ [1994] EMLR 229; p271; A87; own emphasis
- ³²⁸ *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1989] QB 433, at p 439
- ³²⁹ *Multiservice Bookbinding Ltd v Marden* [1979] 1 Ch. 84; at p 110f
- ³³⁰ [1994] EMLR 229
- ³³¹ *ibid.*; 321 at A2.4; re: *Esso Petroleum Ltd. v Harper's Garage (Stourport) Ltd.* [1968] AC 269 at 304 G – 305C as per Lord Morris of Borth y Gest.
- ³³² See the examination studied; [1994] EMLR 229; p328B4.2 et. Seq.
- ³³³ *Ibid.*; p 330-331 B4.6.2
- ³³⁴ *Esso Petroleum Ltd. v Harper's Garage (Stourport) Ltd.* [1968] AC 269
- ³³⁵ *ibid.*; at 300 C-G
- ³³⁶ *ibid.*; at 305B
- ³³⁷ *ibid.*; at p 323A – 324B
- ³³⁸ [1994] EMLR 229; 352; at 4.4
- ³³⁹ *ibid.*; 351; at 4.1
- ³⁴⁰ *ibid.*; p 337 Para 4
- ³⁴¹ *ibid.*; p332; B4:6:6
- ³⁴² Compare with *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816: *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901 as examined in this context post:
- ³⁴³ *Esso Petroleum Ltd. v Harper's Garage (Stourport) Ltd.* [1968] AC 269; as discussed in the instant case at 334-335; B4:6:7.
- ³⁴⁴ [1994] EMLR 229

-
- ³⁴⁵ Discussed at page 168 below
- ³⁴⁶ [1994] EMLR 229; p251-254
- ³⁴⁷ As provided at page 35 above.
- ³⁴⁸ [1994] EMLR 229; 255; A13
- ³⁴⁹ *ibid*; p260 et seq.; from A39
- ³⁵⁰ Above, page 38
- ³⁵¹ *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816; *Ryder v Nicholl and Another* [1999], New Law Online, Case 2991221901 – See p 179 et. Seq.
- ³⁵² [1994] EMLR 229; p 281; A126
- ³⁵³ *ibid*; p 281; A129
- ³⁵⁴ *ibid*; 283; A144
- ³⁵⁵ *ibid*; 284 – evidence of the cause of the beginning of the break down in this relationship can be found in the exchanges which are reported on this page.
- ³⁵⁶ *ibid*; 284; A146
- ³⁵⁷ p 37
- ³⁵⁸ per Lord Kenyon; *Evans v Llewellyn* (1787) 1 Cox CC 333; 29 ER 1191 (Ch) 193
- ³⁵⁹ op. Cit. end note 409
- ³⁶⁰ Originally published: *An Economic Approach to the Doctrine of Unconscionability*, Reiter & Swann, Studies in Contract Law; Butterworth & Co. Canada Ltd.; 1980; 379 at 392
- ³⁶¹ e.g.: *A Schroeder v Macaulay* [1974] 3 All ER 616 at 624 c per Lord Diplock
- ³⁶² Source: Music Week Directory 1995 (Spotlight Publications) - Editor In Chief, Steve Redmond
- ³⁶³ Who have asked not to be named
- ³⁶⁴ *Panayiotou v Sony* [1994] EMLR 229; at 349 1.10 – see also his surrounding deliberations.
- ³⁶⁵ *Ibid*. at p 352; 4.2 et seq.
- ³⁶⁶ *ibid*. at p 354; 4.13
- ³⁶⁷ *ibid*. at p 351; 3.1 – see also his surrounding deliberations
- ³⁶⁸ *ibid*. at p 351; 3.3

15: Arguments Which Support the Proposed Approach

Factors which have been considered during the development of the proposed approach for the hypothetical doctrine can be categorised into four distinct areas: law, economics considerations, other academic suggestions and the findings of behavioural traits among the relevant parties.

15:1 Inequality of Bargaining Power

From current law three principles seem to operate in this context. The first is inequality of bargaining power. In ascertaining the exact place in law where this principle should rest, it can be said that there is a certain level of protection in introducing a new doctrine through 'equity'. For example, there is the simple rule that when the common law and equity disagree, equity will prevail,³⁶⁹ it being the purpose of equity, in keeping with its historical development, to provide the law with a vehicle to intervene and prevent unjust and unreasonable agreements. It seems that it is the maxims and dictums of equity, that prevent its active intervention becoming stochastic or too much personalised in the will of the judiciary. Lord Nottingham L.C (1673-82), (approving Coke C.J.) held that *equitable conscience* should only intervene where there was a conflict of rules or where there was no precedent. This principle was upheld by Lord Hardwicke L.C. (1736-56). Lord Eldon L.C. (1801-27) further established a series of case law with the result that equity took on an element of predictability(certainty). Since the Judicature Acts, 1873, equity has become incorporated with the Common Law - although '*The streams flow together, but the waters do not mix*'!³⁷⁰ One maxim which plays an important role in maintaining distinction between the two formats of law, is that one must come to equity with *clean hands*. For example, if *Macaulay*³⁷¹ or *Holly Johnson*³⁷² had actively breached their contracts by negotiating an alternative elsewhere then pure common law could have overlooked this 'hand dirtying'.

So can inequality of bargaining power be said to be an equitable principle? There seems to be a great deal of 'equitable protectionism' in the frequent speeches of Lord Denning, as well as in those of Lords Reid and Diplock in the *Macaulay* case. Indeed, they seem to be stirring together the "waters" of common law and equity quite effectively in considering *equality of bargaining power*, and by introducing the notion of *unconscionable bargaining*. Equity will not suffer a wrong to be without a remedy - but

that is not intended to mean that equity will lay the foundation to extend common law. When regarding inequality of bargaining power, however, there can be little doubt that despite it being an equitable principle it was born from the development of the common law principle of restraint of trade. Naturally any legal rule or principle must evolve with the passage of time if it is to remain effective, it is not intended to suggest otherwise.

Since feudal times, socio-political struggles as to the status and rights of the “employed” ensued. For example *Dyers’ Case*³⁷³ illustrates that contracts preventing or restricting business competition were not only regarded as void³⁷⁴ but, at that time, parties who created such contracts could face imprisonment. These struggles became stronger and more prevalent with the coming of the industrial revolution, as craftsmen and trained, skilled workers, faced the influx of steam power and mechanised production. Workers skilled and unskilled struggled to secure their rights. But, prior to the development of workers and trades unions during the 19th century, members of various local (medieval) guilds³⁷⁵ *turned-out*³⁷⁶ for better pay or working conditions facing punishment under the common law charge of “Conspiracy in restraint of trade”. Conditions were settled by statute such as The Statute Of Artificers [1563] under which justices had power to fix the wages of both artisans and labourers, and impose penalties on masters or workers for any breach of contract. Regulation of this nature continued until circa 1700.³⁷⁷ It is during *this* period that the traditional question of *equality of bargaining power* was framed and, perhaps, annexed to common law questions of restraint of trade. The differences between an ordinary individual and those of commercial power and stature, or those represented by a successful trade union, were extreme - and obvious as such. The fashionable attitude to what may be viewed as the growing pains of ‘capitalism’ and changing social-class boundaries was indeed *laissez faire*. By the late 18th century, following a string of enactments and reform Acts Parliament had apparently, fully adopted a more *laissez faire* policy. For example a worker may have been subject to a contract which offered him mere subsistence whilst his employer gained great profit as the result of inexpensive labour. In essence there was no policy for intervention against such a contract which had been *freely* entered into. It seems that, in the mind of Parliament, the greater protection for the balance of the economy would generate from allowing the labour force to bind itself to such restraining clauses as employers saw fit

to draw up. But the struggle to form ‘combination’ representation or trades unions to realign the status of the working masses continued. What might now be perceived as a shortfall in the protection of public policy may be largely due to the fact that the first MPs seated from the ranks of labourers and workers did not arrive until 1874. Prior to this:

*Ministers of the crown in most cases knew very little about the lives or feelings of the manual workers; and any signs of organisation among them were frequently regarded with alarm as being potentially criminal or seditious.*³⁷⁸

As Sir Henry Maine saw in 1864:

*[t]he movement of progressive societies had . . . been a movement from status to contract.*³⁷⁹

These words aid in making the point that development in contract law is essential. The risk and cost factors of transacting without such a framework of behavioural guidance as the law should supply are detrimental to both business public and general public alike. This concept, *freedom of contract*, has proven difficult to bring forward to modern times. During his deliberations on the matter, Parker J observed Lord Pearce’s caution:

*“The rule relating to restraint of trade is bound to be a compromise, as are all rules imposed for freedom’s sake. The law fetters traders by a particular inability to limit their freedom of trade so that it may protect the general freedom of trade and the good of the community. And, since the rule must be a compromise, it is difficult to define its limits on any logical basis”*³⁸⁰

As Parker J. also acknowledged, the historical guidance and the source for precedent, providing test relevant to restraint of trade, was *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co. Ltd.*³⁸¹ It appears to be the so-called Nordenfeldt test which has carried the notion of inequality of bargaining power through cases like that of *Esso*³⁸² and into the music industry via *Macaulay*³⁸³ So it can be said that this is the route by which inequality of bargaining power, an equitable principle at heart, and common law restraint of trade have travelled forward in partnership.

This line of reasoning has been studied a little further here. Across its historical development, it cannot be overlooked that inequality of bargaining power has attached

to cases invoking intervention and obtaining remedy because of undue influence. Traditionally these cases concern *coercion* over future properties or rights in reversion; bargains unfair and obvious as such;³⁸⁴ disagreements where there was *no* bargaining or negotiating *per se* and a party has given up gifts so substantial as to be beyond ordinary motive;³⁸⁵ or, as in *Evans v Llewellyn*,³⁸⁶ where property is sold substantially under value. A strong underlying principle in many of these cases seems to be that the aggrieved party sacrifices the future for his present needs, and in doing so often deceives a third party (current or future beneficiary) in that the third party has no knowledge of the bargain which affects their projected expectations.

It is blurred as to whether undue influence is at play when an artist, who *wants* to become famous or successful, is lured by the challenge to enter the music industry and because of this, decides that he *wants* a management/publishing/recording deal. It cannot be said that the other *coerced* him or that his act deceives an innocent third party or affects the economy or real estate values. It can, however be said that the artist, especially early in his career, is not necessarily *equal to protecting himself* and will be *informationally impaired*, he comes to the contract *blinkered* by his general ambition and, perhaps, sacrifices the present with an eye to the future.

In this light, general discussion, both academic and judicial, tends to return to the question of *equality of bargaining power*. Thus the *Macaulay*³⁸⁷ case equality of bargaining power principle was applied in *Clifford Davis v WEA*³⁸⁸ (the Fleetwood Mac case as discussed above) even though it was a case about undue influence. There is an important distinction between the outcome of the *Macaulay*³⁸⁹ case and cases decided under the equitable remedy of undue influence. The appellant Macaulay's agreement was void, therefore unenforceable. The effect of the ruling was that he was released from his obligations with effect from a given date:

... Insofar as the plaintiff has actually executed assignments of copyrights in his compositions to the defendant, that remains effective, and the defendant is entitled to the copyright on the agreed terms as to the plaintiff's share of royalties etc. Insofar as the contract would otherwise have operated as an assignment of copyright in future compositions only under s 37(1) of the

*Copyright Act, 1956, [in force at that time], the contract being unenforceable the section does not operate.*³⁹⁰

Alternatively, for those cases remedied under undue influence, copyrights were transferred back to the artist/writer, and accounts adjusted in their favour in accordance with the gains and benefits they should have had from the outset, allowing for reasonable investment by the other party.³⁹¹ In this respect Equity seems better to judge and rectify the 'intention' of the contract, at least from the artist's point of view.

Finally, in similar discussions about the notion of *unconscionability* it can be pointed out that - Canadian writers Reiter & Swan³⁹² uses the terms *inequality of bargaining power* and *unconscionability* as though the two had one and the same meaning. Alternatively J. N. Adams³⁹³ prefers an analogy with the European style rules of *good faith*. But in a prediction that remains so far disappointed, Slayton³⁹⁴ provides a distinction for what he calls *unequal bargains*, with reference to Denning M.R.'s words in *Lloyds Bank Ltd. v Bundy*, by saying:

*. . no confidential relationship or duty of fiduciary care is necessary (and importantly here) undue influence need not be proved as a fact, but will be presumed when bargaining power is impaired and the terms are very unfair or consideration grossly inadequate. If this is so, then clearly a new doctrine of momentous scope has been introduced into the law of contract.*³⁹⁵

It is likely that Slayton is to continue to be disappointed in this matter as the wisdom of Dillon LJ. Is preferred:³⁹⁶

Inequality of bargaining power must anyhow be a relative concept. It is seldom in any negotiation that the bargaining powers of the parties are absolutely equal
...

This is taken here to support the suggestion that the principle cannot stand alone. It is a subjective concept and will only serve to invigorate and argument or to add weight to a suggestion that a contract is invalid where other areas of the relationship or of the documentation are detrimental and unreasonable.

As far as the working of the hypothetical doctrine is concerned, George Michael demonstrates that inequality of bargaining power, lays distinctly at the formation stage

of a contractual relationship. It addresses the conditions under which the contract is drawn up and an Agreement entered into. It is felt here to be a good tool or test to establish whether or not a full *meeting of the minds* agreement was ever reached. It is something less than undue influence or duress because there is no coercion, however, where there is inequality of bargaining, the weaker party can be described as not equal to protecting himself and as being blinkered as to the potential consequences.

15:2 Good Faith

The second of the three principles of law, is that of *good faith*, an exact definition of which is typically illusive in English law. It is interpreted here as meaning open handed dealing at all times.³⁹⁷ Thus the intention behind behavioural suggestions such as:

2:4:5 The Offeree is obliged to incorporate into the contract the long term intentions of the Offeree, the expectations of the Offeree and any areas of exchange, trading or other dealings where the Offeree is not prepared to be flexible or co-operative toward change

given at page 37 above, is to install a set of common grounds for expectations in good faith in this particular area of trade. This goes against the grain of Lord Ackner's opinion and that of the House of Lords as expressed in *Walford v Miles*:³⁹⁸

*... a duty to carry on negotiations in good faith is repugnant to the adversarial position of the parties when involved in negotiations ... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.*³⁹⁹

Lord Ackner seems to take the view that negotiating parties must be in a position to get the most possible from a bargain, whilst giving away as little as possible. For sharp in sharp out transactions perhaps that is sometimes the way it should be, but the majority of consumers, and Parliament, seem to have other views. With respect, their Lordship's view is felt here to be too narrow, especially it is too harsh a view of the process of negotiation to be applied to contracts for long-term relationships. A duty to *good faith*, whilst the parties negotiate and reach a meeting of the minds at the beginning of a long relationship is surely essential.

15:3 Public Policy

The third legal principle to be accepted here is Public Policy, (if indeed this can be called a principle *per se*). Measures of unconscionable behaviour in commercial transactions and binding relationships are very much issues in the realm of public policy. In exploring the general hypothesis that the principle of unconscionability can be developed into a fully framed doctrine in English law, this realm of legal concept cannot be ignored. It has been made clear to this point, that while at times some judges exercise flexibility and pragmatism, the majority have refused to consolidate what they perceive as broad and currently vague concepts such as unconscionability. Perhaps advice like that of Burroughs J. shapes their caution. He considered public policy, “ . . . *a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law*”.⁴⁰⁰ Lord Browne-Wilkinson, however, has taken an influential step, in contemporary practice, toward bringing public policy issues to the fore. He has firmly put to one side the rationale of Lord Scarman from *National Westminster Bank plc v Morgan*⁴⁰¹ (for future deliberation) and takes up the question of abuse of confidence and/or failure in fiduciary duties, “ . . . *founded on considerations of general public policy*”. In 1902 Lord Halsbury doubted that any court could, “ . . . *invent a new head of public policy*”.⁴⁰² But abuse of confidence, breach of fiduciary duty and inequality of bargaining power are not new heads. Collectively they can be pitted together in a structured presentation towards a code of behavioural practice, for which Browne-Wilkinson has paved the way.⁴⁰³ This is why it is suggested that the term *Unconscionably Constructed Contract* may create an acceptable starting point by providing the meaningful ‘label’ apparently required. From this starting point a structured mechanism may develop which would prevent the feared stampede of ‘unruly horses’, and, for the benefit of the general contracting public, formalise the *ad hoc* invocation of public policy based intervention which otherwise obtains. The general ethos for entering *public policy* into a legal dispute is that it has the quality of licence to expand existing law or to justify one off decisions in the name of law. In addition it has already been expressed at page 48 that one result of analysis is the belief that law is of itself public policy. When discussing whether the George Michael case attracted common law restraint of trade as compared with equitable unconscionability Parker J. remarked:

Both jurisdictions are based on public policy, there being no other justification for the court intervening where contractual obligations have been assumed voluntarily. However, although both jurisdictions may be rooted in a single broad public policy, the position has now been reached on the authorities (as I read them) where differing public policy considerations – or differing aspects of a single broad public policy – apply to each jurisdiction.

He goes on to do what it is believed here public policy empowers him to do. That is to ask the question, which interest or interests must be protected in order for the law to provide the best service for the public at large, the contracting community as a whole and the trading community to which the case must be addressed. The point that Parker J. makes is that:

There are two limbs to the Nordenfeldt test: reasonableness as between the parties and reasonableness in the public interest. The onus of establishing that the contract is reasonable as between the parties is on the proponent of the contract (a test which he felt this contract passed) while the onus of establishing that, although reasonable between the parties, it is nevertheless contrary to public policy lies on the party challenging the contract.⁴⁰⁴

Notwithstanding the passing entertainment value of a high profile case like that of George Michael, in the tabloid dominated era in which we live, it is felt here that it is in the best interests of all and sundry if an unconscionably constructed (or flawed) long-term contractual relationship can be coached towards a mutually damage-limiting wind down.

15:4 Economics Considerations

In preparing 2:4 Suggested Conduct and The Terms of an Agreement, and the surrounding suggestions, the economics of entering, maintaining and concluding a long-term, contractually binding relationship have been firmly in mind. The purpose is to reduce the possibilities for contentious surprise in the relationship and minimise the cost of managing it while living-out the contract. More specific factors have already been addressed such as the monopoly/oligopoly argument raised in connection with equality of bargaining power above. In short, the music industry can be diagrammatically represented as:

| | <u>How Many</u> ⁴⁰⁵ |
|--|---|
| Record Companies | 600 |
| UK Subsidiaries of International Record Companies | 6 |
| Management Companies | 425 |
| Publishing Companies | 175 |
| Subsidiary & Administered Publishing Companies | 3,000 |
| Successful Rock & Pop Bands/performers | 4,000 |
| Aspiring Rock & Pop Bands/performers | 5,000 – (this is thought to be a gross underestimate) |
| Writers/Composers | 1,500 - Receiving PRS payments over £5,000 p.a. |
| Writers/Composers | 24,000+ |

Of the 24,000 active writers (who are members of the Performing Rights Society) many will also be performers. The bands and performers represented here are not necessarily all recording artists or artists with a record company contract (some performers record and sell their own material ‘on the road’ and there is not room to consider this private enterprise here except to say that it, too, plies against the suggestion of monopoly-control in the business of making music for a living). It is suggested that the 4,000 who are listed as “successful” have, or have had, lucrative recording deals, while those who are listed as aspiring do not necessarily have deals or contracts. With some 5,000 aspiring performers and/or bands to chose from a record company is not necessarily threatened by the loss or change of one specific artist. However, it is recognised that there would be some development and promotional cost in replacing a big-name artist. It must also be recognised that, with few notable exceptions, artists’ popularity can be sustained only for a limited period of time before fashion and market forces dictate the desire for new styles of music and personality.

In an industry which serves such a fickle and fragile market the trade relationship between artist/writer and company needs to be one which is flexible and one which can be nurtured and exploited as time goes by if optimum profit and satisfaction are to be achieved. Commitment, or long-term exclusivity, for instance, should be addressed as an opportunity cost, not as a restriction.

15:5 Academic Suggestions

The most prominent academic suggestion to influence opinions and decisions made here is the notion of intra contract co-operation. (notwithstanding that unconscionability as a principle in its own right is capable of being viewed as an academic reasoning, but one which is finding stronger currency at law as time progresses).

Following the discussion from page 96 above, it is assumed here that the principle could be extracted from *Williams v Roffey Bros. And Nicholls (contractors) Ltd.*⁴⁰⁶ irrespective of whether it is proven to have taken place during that relationship. The suggested conduct and terms of Agreement laid out at 2:4 above have been drawn up in the assumption that intra-contract co-operation is a just and workable expectation for those entering into long-term contractual relationships. In addition it is felt that the law would have no difficulty upholding this principle and describing to contracting parties for their future benefit. An overall reading of George Michael's expectations, as established through evidence given in his case against Sony, has led to the belief that artists, at least, anticipate a high degree of intra-contract co-operation through their relationship. This being so, development of that principle as part of the structure towards curtailing unconscionably constructed contracts, would be a mere development of natural (good) behaviour.

It is also considered here that a selection can be made from the following critical distinctions of contractual behaviour, and an approach established by which even the parties themselves can be encouraged to recognise whether a contract (or contractual relationship) is an *unconscionably constructed contract*. By acknowledging contrasts and comparators here the origins and complimentary background of the materials for the selected criterion of approach will not be devalued.

(i) Substantive Unconscionability⁴⁰⁷

Terms and conditions within a contract which are:

- (a) . . hidden or not easily accessible to one party in all the circumstances
- (b) . . usurious, onerous or substantially unfair and damaging as such

These bases for cause in disputes are already subject to the attentions of both the judiciary and Parliament and it is not intended to analyse them further as part of the proposal here.

(ii) Procedural Unconscionability⁴⁰⁸

Facts and circumstances surrounding the formation of the contract

(a) The aggrieved party's background; business acumen; advisors and personal drives;

needs and ambitions, where these affect freedom of negotiation.

(b) Levels of disclosure, where this affects understanding of the agreement to the extent that it is questionable whether the contract truly represents *consensus ad idem*, or the intention and will of both parties.

Of the two, Procedural Unconscionability is the most apt sub-structure for this exercise.

Add to this: firstly, Trebilcock's approach⁴⁰⁹ to what he calls an "informationally impaired market", divided into three classes:

(i) Lack of Normal Information-Processing Capacity

Here he gives an example of an individual momentarily *incapacitated* by the skills of a door-to-door salesman, consequently contracting to buy products which upon reflection do not represent a wise or wanted purchase.

[It is not suggested that these petty sales contracts should be able to be undone under law as a matter of policy, but the analogy does portray the philosophy behind the suggestion that many of the cases discussed later could have been better addressed. For example, the (otherwise) *reasonable* victim of the salesman could be compared with the songwriter Macaulay⁴¹⁰ and, at the beginning of his career, singer/songwriter George Michael.⁴¹¹]

(ii) Cases where one party fails to disclose material information

This brings into question openness in contractual negotiations and stands comparison with legal rules and doctrines such as *good faith*, which operate in other Commonwealth and European jurisdictions.

(iii) Standard Form Contracts containing clauses which are not read or not understood⁴¹²

The music industry cases scrutinised in this discourse clearly illustrate difficulties which arise both for the courts and for individuals when dealing with poorly negotiated variations of standard-form contracts. This is especially a problem where these contracts represent long-term relationships.

Alternative, though not necessarily conflicting, analysis to that provided by Trebilcock includes Yates' opinion⁴¹³ that by seeking to apply tests of reasonableness there is a danger that the law will continue to recognise the consumer as a weaker party (in need of legislative protection) and will continue to limit consideration for so-called business men. The difficulty identified in the discussion here is established as the complexity of assuming an untrained, non-business oriented personality such as an artist can have a comparable status with other business community entities. Broadly, it can be said that the law assumes a corporate or business based entity to be capable of transacting and trading without protection except where there is an obvious fault such as an 'illegal' monopoly or otherwise deliberate illegitimate acts such as fraud are in play. In reality the artist, and other types of small or independent businessman, has much more in common with consumers in terms of business sophistication and degrees of agility in legal or lawful business conduct.

In short, although Yates differs from Trebilcock in his approach to standard form contracts there appears to be a fundamental agreement in that:

*Society must be aware of the demands of the economic machine for efficiency, productivity and profit; in formulating its protections against those who abuse their bargaining strength, society must not sacrifice the rational administration of the economy.*⁴¹⁴

15:6 Behavioural Traits

With no exceptions, those music industry executives who have been approached for the purpose of building a picture of behavioural traits have shied away from interview. Information about them has been gleaned from indirect sources. Those sources are,

personal experience, having worked alongside many of these people for some 10 years between 1980 and 1990; biographical material which has been selected either because executives themselves have recommended it as an alternative to participating in interview, or because the writers have been known and trusted; reportage has been used with caution. Approaches requesting discussion about opinions of current law have been met with sharp intake of breath and comments such as *contract law. . . that's a complicated* (one even said dangerous) *subject*. One retired executive P.A. stated that he frequently noticed that those high level negotiators who were not lawyers tended to

believe that their solicitors had the power to do anything! One in particular would dictate "bullying" clauses which he thought were protecting his own interests but which had to be redrafted and approved by the solicitors because they would have done him more harm than good.

One record company arranged an interview with their lawyer which led to the meeting of other lawyers in the same field and their contributions are scattered through the discussion above. This response is not beyond analysis as it supports the conjecture that music industry executives are essentially introvert characters. When they reach high level in their career it becomes obvious that they are a group of people who are empowered by their own convictions and who draw strength from independent decision making. This observation remains true whether the personality is manifest as demonstrative or non-demonstrative. In order to be able to deal with a framework of behavioural governance these individuals need the components of that framework to be clear and precise. They also need to be able to calculate the cost of non-adherence as well as the value of compliance. Their thinking towards their contractual relationships already incorporates the long-term view, but their thinking towards contract law is evidently less clear and they do not greet it with an open mind.

Artists have no clear picture of contract law at all. It remains a mystery to them and the higher profile artists depend on advisors to steer their dealings. This seems peculiarly irresponsible given that they are the principal to contractual obligations. The survey done for this research, case studies and biographies, as well as personal experience, all support the statement that artists are a class of people who live in the realms of what is possible rather than what is actual. This attitude will greatly affect their expectations

towards their long-term relationships and towards what they will be allowed to produce in creative terms while honouring those relationships. All the research studied here agrees that it is the artist's motivation towards his career which is the predominant factor in his character make-up. This motivation is more often than not generated during childhood. Robbie Williams, for example, talks about the impact of watching his father (a professional club singer and entertainer) work to an audience. Robbie Williams developed the drive to have an audience admire his own talents. Even the most unassuming of artists has, it seems, got the same early cast motivation and drives:

*. . . and later a few autographs like the picture I got of Chris Barber's Jazz Band after I went to see them at City Hall in 1956 - they all signed that picture 'Hank'!. . . I thought maybe if I learned to play the banjo well somebody would rush up and ask me to sign one day . . .*⁴¹⁵

*. . .In 1957 I went to see Jim Dale just as he was breaking big with "Me and My Girl" and the atmosphere was tremendous. The place was packed and the screaming rose to fever pitch. "Wow" I thought, "this is for me", and I resolved really to do something about it . . .*⁴¹⁶

It is this long nurtured desire which drives them, often carelessly, towards signing a contract which will amount to a long-term relationship with the other party. This personality trait allows their imagination to predict their future with keen ambition.

Musical tastes are likely to have been generated at an early age too, and as his career develops the artist will expect to be able to embrace experimental or more eclectic styles in order to express himself more fully. This last statement can be said to be evidenced through the 'change in direction' of George Michael, or the manifestation of Sgt. Pepper's Lonely Hearts Club Band during The Beatles' career, or David Bowies' path from standard session musician through Ziggy Stardust to whatever his current guise. Pub and club musicians observed here also show a tendency to develop towards a more stylised choice of music as they become established.

Overall it is felt here that if the more corporate parties in the music industry were coached to review their approach to long-term contractual relationships, artists themselves would be able to broaden their understanding and expectations with a modicum of difficulty. The law is capable of being its own messenger in this respect and the attitude of Parker J. in the *Panayiotou v Sony*⁴¹⁷ case, it is felt, demonstrated a comprehensive commercial awareness toward the business with which he was dealing.

16: What Has Been Rejected in Formulating the Hypothesis

That which it is felt augers against the effective development of the hypothetical doctrine can be summarised as:

The increasing practice of alleging and considering at law restraint of trade in the circumstances discussed here. During the George Michael case, Parker J. gave attention to the workings of the doctrine in these circumstances and concluded:

*Fluidity of classification thus being one of the hallmarks of the doctrine of restraint of trade. . . it is not entirely easy to discern which yardstick or test is to be applied in [-] selecting from the whole range of contracts which are, in ordinary parlance, in restraint of trade those contracts which are currently liable to be subject to the necessity of justification by reasonableness. On the other hand, it is significant, in my judgement, that Lord Reid, Lord Morris of Borth y Gest, Lord Pearce and Lord Wilberforce all approach the question 'Where is the line to be drawn?' by considering which contracts (being contracts in restraint of trade in ordinary parlance) do not attract the doctrine of restraint of trade. . .*⁴¹⁸

As has been expressed throughout this discourse it is felt that this difficulty in clarity and application of the law does nothing to add to the traditional doctrine of restraint of trade and does little to advise the parties for future contractual behaviour. Businessmen and artists may have a clearer notion of the 'off side rule'.

The Shaun Ryder case, which is to be discussed in full shortly, may go a long way toward explaining why continued attempts to examine these contracts as unreasonable in restraint of trade seem unacceptable here. This is a case which may be distinguished from the others discussed here as it brings to prominence the legal principle of waiver.

This was raised during *Panayioutou v Sony*. Parker J. First dismissed the possibility of George Michael having affirmed the terms of his contract

*As to the requirements of affirmation, it is well established that a contracting party will not be held to have affirmed the contract unless (inter alia) he has knowledge of his legal right to choose between the alternatives open to him [-]. In the instant case, Mr Michael learnt on 14 February 1992 that it was open to him to contend the 1988 agreement was unenforceable [-]. Accordingly, in my judgement, no affirmation can have occurred before that date. . .*⁴¹⁹

Beyond this, however, Parker J. moves to consider Sony's defence of acquiescence. On this matter he states:

It is clear from the judgement of Dillon LJ, in Holly Johnson that, in contrast to affirmation, this defence requires a consideration of all the circumstances of the case. . .

He went on to consider whether it would be unfair and / or unconscionable to allow George Michael to claim that the 1988 agreement was unenforceable, considering the facts upon which Sony had relied in its conduct during the relationship. He also considered the question in the light of counter equities raised by Sony, but in the event of his conclusion he reported

The position remains that it is unfair to Sony Music, and unconscionable, for Mr Michael now to assert that the 1988 Agreement is unenforceable. Accordingly, Sony Music's defence of acquiescence succeeds.

Notwithstanding this, it is true to say however, that the bulk of the George Michael case was given to considering other matters. Affirmation and Acquiescence make up just a few pages of a report which runs to over 200.

In the Shaun Ryder case, it seems that the judge at first instance was not invited to give his attention to *Panayioutou v Sony*. It is not clear why the case was overlooked as it was reported in 1994. However, suffice it to say that the question to be considered in the Shaun Ryder case was whether a contract obtained by undue influence and in unreasonable restraint of trade had been affirmed or acquiesced in by the defendant and was, therefore, enforceable.

At first hearing, and at Appeal the judgement in Shaun Ryder was shaped largely by the dictum of Dillon LJ. from [the Holly Johnson case] *Zang Tumb Tuum Records Ltd. and Another v Johnson*,⁴²⁰ as was the case before Parker J. on this matter. In the Holly Johnson case it was found that a recording agreement and a publishing agreement were both unenforceable as being unreasonable in restraint of trade. The decision making process was naturally influenced by the *Esso, Macaulay* pattern as discussed extensively here above. The defence of Waiver (or acquiescence) held no ground because it was decided that it was neither unjust to the Plaintiffs, (a record company and a publishing company), nor was it unconscionable for the defendant to assert the unenforceability of the two agreements.

The defence failed in *Nicholl and Another v Ryder*, and the Appeal failed because the singer's advisor and lawyer had depended on one of the terms of the contract so that both parties could be said to have irreversibly altered their positions as a result of relying on that contract. If it comes to be interpreted in the music industry this case might at least make the parties contemplate how they conduct their relationship. For example, had Robbie Williams acquiesced when he rallied restraint of trade against RCA? Was it knowledge that that was their defence which led him to settle quietly? If George Michael's had prepared better would they have realised that this was one of Sony's defences and could this have dissuaded George from proceeding with such costly litigation.? Alleging that a contract is unreasonable in restraint of trade after taking some benefit or allowing the other to act to his detriment in reliance upon the contract is unconscionable behaviour indeed. To try to use such an allegation in the way that the George Michael party did is an act which flies against *good faith*. The behaviour of the corporate parties as described in the holly Johnson case was, it is thought here, reprehensible, unconscionable towards living-out the contract and enough in itself to have rendered this an unconscionably constructed contract. It is difficult to define the behaviour of any of the parties in the Shaun Ryder case, as will be seen. However, the living out of that contract was not performed in *good faith* either. It could not be found unconscionable to bring to an end that which is unconscionable itself.

Also expressed through the text above is the similar rejection of the development of the doctrine of undue influence in this field.

The notion that standard form contracts in the music industry are non-negotiable, overly complex and harsh is not supported here and is not supported by Parker J. Having said that the view of the House in considering the *Macaulay* case was that music industry contracts were offered on a take-it-or-leave-it basis. Thus the advisory comments given at 2:4 above have attempted to incorporate precaution against non-understanding and inadequate advisory practices in relation to these types of contracts. Caution is also offered against non-major companies who might build a non-sensible contract or, as in the *Shaun Ryder* case, outlined below who might accept on their own behalf contracts which they do not understand themselves and which do not reflect their intentions. Where that happens a dispute may become a tit-for-tat debate about what the contract amounts to.

END NOTES

- ³⁶⁹ Coke C.J the Earl of Oxford's case (1616)
- ³⁷⁰ G. Williams; "Learning the Law"; 10th ed. pp 24
- ³⁷¹ *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616
- ³⁷² *Zang Tumb Tuum Records Ltd. and Another v Johnson*, [1993] EMLR 61 discussed below
- ³⁷³ [1414] Y.B. 2 Hen. V Pasch. pl.26
- ³⁷⁴ See also *Claygate v Batchelor* [1602] Owen 143
- ³⁷⁵ (generally 'craftsmen' or skilled workers)
- ³⁷⁶ The word 'strike', probably an analogy of ship striking sail, was not used as a term in the sense of stoppage of work until the 19th century.
- ³⁷⁷ H. Pelling; "A History of British Trade Unionism"; Pelican; Penguin Books Ltd., 1971; Part One
- ³⁷⁸ H. Pelling; "A History of British Trade Unionism"; Pelican; Penguin Books Ltd., 1971; Part One
- ³⁷⁹ *Ancient Law*; 1861 Chapter IX
- ³⁸⁰ Lord Pearce: *Esso Petroleum Ltd. v Harper's Garage (Stourport) Ltd.* [1968] AC 269 at 305D
Parker J *Panayioutou v Sony* [1994] EMLR 229; at 321, A2.5
- ³⁸¹ [1894] A.C. 535
- ³⁸² *Esso Petroleum Ltd. v Harper's Garage (Stourport) Ltd.* [1968] AC 269. As discussed above
- ³⁸³ *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616. As discussed above
- ³⁸⁴ *Aylesford v Morris* [1873] L.R. 8 Ch. App. 484
- ³⁸⁵ *Re Craig* [1971] Ch 95
- ³⁸⁶ See end note 358 above
- ³⁸⁷ *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616
- ³⁸⁸ *Clifford Davies Management Ltd. v WEA Records Ltd and Another* [1975] All E R 237
- ³⁸⁹ *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616
- ³⁹⁰ [1974] 1 All ER 171 at 181, e. per Russell LJ, QBD
- ³⁹¹ See *Gilbert O'Sullivan v Management Agency and Music* [1985] post:
- ³⁹² *An Economic Approach to the Doctrine of Unconscionability*, Reiter & Swann, Studies in Contract Law; Butterworth & Co. Canada Ltd.; 1980;
- ³⁹³ Adams J.N.; *Unconscionability and the Standard Form Contract*; Welfarism in Contract Law; Brownsword et al.; Dartmouth Publishing Co.; 1994
- ³⁹⁴ Slayton; *The Unequal Bargain Doctrine*; (1976) 22 McGill LJ 94
- ³⁹⁵ *ibid.*
- ³⁹⁶ *Alec Lobb Ltd. V Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 at p 183C. Observed by Parker J. [1994] EMLR 229; at 352; 4.3
- ³⁹⁷ *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1989] QB 433, at p 439. Also: See Appendix 1 for a brief view of the principle as it operates in other jurisdictions.
- ³⁹⁸ [1992] 1 ALL ER 453
- ³⁹⁹ *ibid.* at p 460 - 461
- ⁴⁰⁰ *Richardson v Mellish* (1824) 2 Bing. 229 at 252
- ⁴⁰¹ [1985] 1 All ER 821
- ⁴⁰² *Janson v Dreifontein Consolidated Mines Ltd.* [1902] A.C. 484 at 491
- ⁴⁰³ p 95 above
- ⁴⁰⁴ [1994] EMLR 229; at 328 B4.1. In accordance with *Herbert Morris Ltd. v Saxlby* [1916] 1 AC 688 700 and 707-708 as followed in *Esso Petroleum Ltd. v Harper's Garage (Stourport) Ltd.* [1968] AC 269 at 319D-E
- ⁴⁰⁵ Source: National Music Council; The Value of Music; November 1996. Information drawn from: University of Westminster estimates, MMC (1994) *The Sale of Recorded Music*; Cm 2599, PRS and the IMF.
- ⁴⁰⁶ [1990] 1 All ER 512
- ⁴⁰⁷ Source: Leff; *Unconscionability and The Code - The Emperors New Clause*; 115 U. Pa. L. Rev. 485; 1967; *Thomist Unconscionability* 4 C. B L.J. 424; 1980 Also: per Clark R.W. *Inequality of bargaining power*; Carswell; 1987; were it is claimed that this concept is advanced in the case *Hart v O'Connor* [1985]
- ⁴⁰⁸ *ibid.*
- ⁴⁰⁹ Trebilcock M.J.; *An Economic Approach to the Doctrine of Unconscionability*; Studies in Contract Law; ed. Reiter & Swan; Butterworth & Co. (Canada) Ltd.; 1980; p379

⁴¹⁰ *A Schroeder Music Publishing Co. Ltd. v Macaulay* [1974] 3 All ER 616

⁴¹¹ *Panayiotou v Sony* [1994] EMLR 229; The Times June 30 (1994)

⁴¹² *Nicholl and Another v Ryder* (1998) QBD U980659 1986 N 816: provides a good illustration of this

⁴¹³ Yates D.; *Exclusion Clauses in Contracts*; Sweet & Maxwell ; 1982

⁴¹⁴ *ibid.* p 10-11

⁴¹⁵ Mike Read ed. *Hank Marvin; The Story of The Shadows*; An Autobiography; Sphere Books Ltd. 1984 pp9

⁴¹⁶ Bruce Welch; *ibid.* pp23

⁴¹⁷ [1994] EMLR 229; The Times June 30 (1994)

⁴¹⁸ *ibid.* 327 at B2.5

⁴¹⁹ *Panayiotou v Sony* [1994] EMLR 229; 386; Affirmation

⁴²⁰ [1993] EMLR 61

17: Nicholl and Another v Ryder (1998)

The judicial approach which is evidently at play in the Shaun Ryder case at first instance, is that of avoiding attribution of any form of incapacity to the obviously weaker party. The American, Friedman⁴²¹ gives an account of this type of judicial behaviour in his discussion about *Kreuger v Buel*.⁴²² About Shaun Ryder, Matthews J. says

The Defendant went to a secondary school where he attended special learning classes. He left before he reached the age of 15. He was 25, he told me, before he learned the alphabet and he has always had problems with reading, writing and spelling. . . .

He has been a registered drug addict since he was a teenager and has abused heroin. He denies abusing heroin during the current decade and says that for the last 15 years he has been prescribed methadone as a substitute. . .

*It was plain to me that the defendant's health is fragile, and indeed so fragile that it gave rise to a request by the defence to interpose his evidence before the end of the Plaintiff's case so that he could return to Ireland. The ravages of his addiction were plain to see.*⁴²³

The trigger for litigation in this case was a claim that the artist owed commission payments to the Plaintiffs, his managers. There was some contention as to the rate at which some commissions should be calculated, i.e. whether it should be, by the terms of the agreement, 20% of gross or 20% of net income from live performances.

Q: How could the court have gone about establishing whether or not there was an *Unconscionably Constructed Contract*?

It is very hard to establish *consensus ad idem* or true agreement at the formation stage of this contractual relationship. Of the artist it can be said that he intended to form a relationship with the record company, Radioactive, which was a subsidiary of MCA in America. His intention was to revive his career following the demise of his part as frontman and singer with the successful band Happy Mondays. He claims that he met the principal of Radioactive records, Mr Kurfurst, through a mutual acquaintance with booking agent Ian Flooks.⁴²⁴

The Defendant maintained in his evidence that he understood that Mr. Flooks and Mr Kurfurst were to be his managers. Then Kurfurst and Flooks split up. Mr Kurfurst appointed the Plaintiffs to act on his behalf to look after the defendant. Gary Kurfurst told the Defendant that since he was based in the USA the Defendant should speak to the first plaintiff when he needed something. The Defendant said that he met the first Plaintiff when he was working with Happy Mondays. He found him arrogant and obnoxious and took an instant dislike to him. He accepted Mr. Kurfurst's suggestion that the Plaintiffs look after him only because he was keen to retain the support of Gary Kurfurst, and with reluctance.⁴²⁵

This extract merits quoting in full because it clearly lays out the beliefs and attitude of the artist toward his managers.

The managers' intentions and expectations are equally as illusive. Matthews J. preferred their version of events, particularly since neither Kurfurst or Flooks was available to corroborate the artist's recollections on the matter.⁴²⁶ At the outset, the only common ground which is in evidence between the parties is the expectation for the revival of Shaun Ryder's pop music career.⁴²⁷ There was agreement that the promotion and sale of records would necessitate touring with a band.

In 1992 both Plaintiffs, Mr and Mrs Nicholl, were employed by another of Mr Kurfurst's companies, Red Eye Records Ltd. Mr Nicholl's job was to book tours and draw up itineraries for them. Mrs. Nicholl was employed as a secretary for the company Overland, also operated by Kurfurst. She had worked in this capacity within the music business for some 20 years. For more or less the same length of time her husband had been involved in the music industry, working as a musician, technician, sound engineer and tour and production manager.⁴²⁸ Matthews J. took this to indicate that the two managers were very experienced in the ways of the music industry although he acknowledged that neither had had any experience of negotiating record or publishing company contracts, or of the management of artists.⁴²⁹

In due course, Shaun Ryder entered into a recording and a publishing agreement with Radioactive, for which purpose he travelled to New York. He claimed that Mrs Nicholl was not present at the negotiations in New York. However, her passport provided evidence that she and her son were in New York at the relevant time. No evidence is given or reported in this case which conclusively proves Mrs. Nicholls attendance at that meeting,⁴³⁰ (save that “they were given red carpet treatment”⁴³¹ on their arrival) In the same month as the recording and the publishing deal were initiated, a UK based *independent* solicitor, Mr Law, was appointed. The extent of his independence from the living-out of the contract will be examined in due course.

Remaining with the issue of intentions and expectations, it is clear, since it is the cause of this litigation, that the Nicholls expected to receive commissions at 20% on all *gross* income generated by the work of the artist, including live work, touring, merchandising as well as record sales and publishing royalties. Mr Nicholl gave evidence that this agreement was reached during a meeting at a pub’ near Manchester where he said that the Defendant was told

*. . . and subsequently accepted that the Plaintiffs would be rewarded for acting as his manager by taking 20 per cent commission upon all his earnings; in other words, commission on touring earnings (the precise matter of the contention between the parties) would also be paid on the gross income and not on a net basis.*⁴³²

However, there is not good evidence of a meeting of the minds over this matter, as Shaun Ryder gave evidence that he did not know whether the plaintiff told him that at the meeting because he could not remember. To support her husband’s proposition Mrs Nicholl told the court that

*. . . she knew that sometimes managers received 20 per cent commission on net income from live dates. In those circumstances, however, she said that she believed the artist paid the manager’s expenses. Mrs Nicholl said that she thought it would be impossible to get expenses paid by the Defendant and it was therefore better for the Plaintiffs to pay their own expenses and charge commission on the gross touring income.*⁴³³

Expert witnesses gave evidence that it is most unusual, nowadays, for commission on touring income to be calculated from the gross. This is because of the expense involved in operating the tour itself.⁴³⁴ Under cross-examination Shaun Ryder said that he would not have understood the significance of the alleged conversation with Mr Nicholl. To him, he said, it was all just “gobbledegook”.⁴³⁵

All in all, the evidence discussed above is taken as enough to support the suggestion that, not only was there a failure to reach *consensus ad idem*, there would have been great difficulty in doing so without proper memoranda of every conversation held with the artist. His consistent use of cannabis, combined with his dependence on methadone was enough to render his memory and his attention span very short indeed. This condition is not altogether uncommon among artists in the music industry and due precautions should be encouraged. Already it can be seen that there are commercial advantages in dealing with a large, well organised corporation such as CBS/Sony, over dealing with the less experienced in business. John Kennedy, Legal expert for Sony stated during the George Michael case that he has evolved a list of over 70 check points⁴³⁶ to aid negotiation with artists. Lessons are there to be learned. Teaching those lessons, however, is not in the remit of contract law *per se*.

If a genuine agreement cannot be evidenced at the formation of this long-term contractual relationship, it falls next to look to the living-out of that relationship over the few years which followed.

The artist accused the managers of breach of fiduciary duty and of obtaining payment of more than £16,000 by deceitful conduct. The money was the subject of much confusion over rates of commission due after a tour in 1996, merchandising commissions and the exact source for authority to the accountants to pay the money.⁴³⁷ The fact that the plaintiffs were, at one stage, some 24 hours from bankruptcy was influential in the accountant's decision to pay over the money. There is some dispute as to whether some of the money is representative of an agreement made by Mr Law, the artist's advisor, to pay touring commission at 20% gross on this final occasion before bringing into force the alternative agreement to pay at 20% net from tours in the future.⁴³⁸ It is not clear

whether, in reality, the plaintiffs falsely caused the accountants to believe that there was authority for the payments, whether there was genuine authority or some other situation. There was a point in time when the plaintiffs advisor/solicitor informed the defendants advisor/solicitor that the plaintiffs were in such a poor financial position that they could not continue to cover their expenses and would have to withdraw their services if the defendant did not release monies which they felt they were owed. During the same hour, the artist's solicitor/advisor had notified the other party that his client wished to terminate the agreement with immediate effect. He mentioned that he had advised his client that the terms of the contact were an unreasonable restraint and therefore unenforceable.⁴³⁹ Presumably he hoped that the managers would leave the relationship quietly in respect of his belief that it was unenforceable at law. No mention was made before preparation for proceedings about undue influence or breach of trust, breach of fiduciary duty or general incompetence *per se*.

On a general reading of the evidence as to the carryings on during this relationship, the most disturbing factor may be this: The first plaintiff took a written version of the management agreement to a recording studio where the artist was working, some months after the relationship had commenced. He took his own version of the paper contract and not the version as amended by the artist's solicitor. (although he claimed to have had that version in his brief case). He persuaded the artist to sign the paper contract while the artist was under the effect of cannabis and had been working at his music all day. The artist's girlfriend witnessed the signatures and signed as witness for the signature of the second plaintiff who was not even present. It was known to the plaintiff that the artist did not understand the finer implications of any of what could have been written therein and that he objected to business discussions of any nature. The first plaintiff had not even read the paper contract himself, even though it was prepared by his own advisors. This last fact is known because it was this version of the contract which carried a written clause stating that touring commissions should be paid at 20% net, industry standard, not 20% gross which is what the plaintiff contends to be his intention.⁴⁴⁰ Under present law it is assumed here that *Walford v Miles*⁴⁴¹ would work against any suggestion that the plaintiff should have been under a duty to contract in good faith at this juncture in his relationship with the artist. The opinion here is that,

subsequent acquiescence or not, this poor method of obtaining a commitment, in bad faith, is an act which goes against public policy. Surely this behaviour creates an unconscionably constructed contract under circumstances which no sector of the public could desire to be upheld as fit and proper? It was accepted in court that this was a relationship of confidence in accordance with authorities including *O'Sullivan v Management Agency and Music Ltd*.⁴⁴²

At page 35 above the general scope for the hypothetical doctrine of unconscionably constructed contracts is laid out. It is thought here that this relationship falls within the terms 2:3:4 ii), iii), iv), v)a and v)b, vi) and vii). Were the suggested Conduct and Terms of an Agreement in place, then regular formal meetings would have occurred and many of the issues in hand could have been dealt with by the parties. Failing that resolve, then an openly accountable winding down procedure might have been more acceptable.⁴⁴³

It has been said earlier that this case brings to focus the defence of waiver or acquiescence, indeed it does. It also throws open questions as to the proper conduct of that defence. In principle the defence does not contradict the workings of the hypothetical doctrine. It seeks to prevent parties from being legally entitled to undo that which has been commercially relied upon or acted upon in good faith. This protection seems to be good public and economic policy. However, if the Holly Johnson, George Michael version of the defence were to be applied then it could not be said that Shaun Ryder had acquiesced because he had no idea of his legal rights before he was advised in 1996 that he could contend the validity of the contract. Under those circumstances the defence (a counter claim of the plaintiffs in this case) would not work. Matthews J. followed a quite different course of reasoning. Firstly he drew from a case involving Elton John⁴⁴⁴ where Nicholl J. made it clear that there is no "hard and fast rule that ignorance of legal rights is a bar". What is more Matthews J. continues to attribute the advisor/solicitor with the guise of authorised agent working on behalf of the artist, his principle. Many music industry solicitors, and others who work with artists in an independent capacity could find this quite alarming. Nonetheless, this attribution was firmly upheld in the Court of Appeal. Thorpe LJ. Makes it clear that he takes the Holly

Johnson case as authority that the defence is operable in the circumstances, but he accepts the decision that

Mr Law's knowledge of the lack of enforceability of the management agreement is properly to be imputed to his principal, the defendant.

Some future clarity is required here as to when an artist's advisor might become, under the law, his agent. George Michael's advisor, Tony Russell, for example is renowned for his negotiating skills and the court recognised his propensity for loyalty toward his artists.⁴⁴⁵ It is something of a benchmark if the later case has the effect of changing the legal relationship of people like Russell.

It is not desired to move to discuss the law of agency here. The impact of the Shaun Ryder case has yet to filter through the music industry and no prediction as to the outcome is offered. It remains only to confirm that if asked of Shaun Ryder

- (i) had he contracted in *good faith*?
- (ii) did his understanding of a *standard form* contract give rise to *reasonable expectations*?
- (iii) did he come to the contract *blinkered*?
- (Needs, wants, cravings and ambitions are drivers that tend to have a '*blinking*' effect)
- (iv) was he competent to negotiate with clarity in all the circumstances?

The answers to i) and ii) are no, he was not in a fit and proper state to comply with measures of good faith and he did not pay any mind to the terms of the agreement, or his own expectations with regard to that agreement, either before or after the implementation of the paper version. The answer to iii) is yes he was blinkered. His very nature would imply that he is always blinkered in matters of detail. He was merely responding to his own motivation and drive to work in the music industry and to become successful again. The answer to iv) is no, it was made clear throughout the case that Shaun Ryder neither negotiated on his own behalf or paid any attention to negotiations which were carried on on his behalf. In short he was not equal to protecting himself.

Of the Nicholls the answer to i) and ii) are also no. Neither made any effort to keep their cards open with respect to the artists difficulties in dealing with business matters. Nor did either of them understand the contract sufficiently well to realise that the paper version did not reflect their intentions. The answer to iii) is that they were as blinkered by their drive to operate in the music industry as was the artist himself. They were motivated to take on what they thought would be a client of some kudos, and to elevate their position within the industry. With regard to iv) it must be assumed that the Nicholls were competent to negotiate. Their inexperience in this area does not necessarily amount to incompetence. Perhaps the blinkering effect defined within question iii) reduced their application of skill.

The nature of this proposed test of unconscionability is not intended to apportion blame. It is merely hoped to find a path to reduce litigious contention and costly dispute within an industry where long-term contractual relationships are prerequisite and integral to success.

END NOTES

-
- ⁴²¹ Friedman L.M.; *Contract Law in America, A Social and Economic Case Study*; The University of Wisconsin Press, Madison and Milwaukee; 1965. See above p 54 et seq.
- ⁴²² (1913); 153 Wis. 583; 142 NW 264 – see above p 54
- ⁴²³ *Nicholl and Another v Ryder*, (1998) QBD. U980659 1996 N 816: p4 D-F
- ⁴²⁴ *ibid.* p7 at D - G
- ⁴²⁵ *ibid.* p 7- 8
- ⁴²⁶ *ibid.* p8 B
- ⁴²⁷ *ibid.* p8 F
- ⁴²⁸ *ibid.* p 2- 3
- ⁴²⁹ *ibid.* see p 3 F
- ⁴³⁰ *ibid.* p 13 - 14
- ⁴³¹ *ibid.* p 13 F - G
- ⁴³² *ibid.* p 10 D and E - F
- ⁴³³ *ibid.* p 11 A - C
- ⁴³⁴ *ibid.* p 9 - 10
- ⁴³⁵ *ibid.* p 11 C - D
- ⁴³⁶ *Panayiotou v Sony* [1994] EMLR 229; p350-351, 2.4 – 2.6
- ⁴³⁷ For full details see as at note 424; p 29 – 34.
- ⁴³⁸ As at end note 424; p 30 F-G
- ⁴³⁹ *Nicholl and Another v Ryder*, (1998) QBD. U980659 1996 N 816: p 35 C-F
- ⁴⁴⁰ *ibid.* p 19 - 20
- ⁴⁴¹ (1992) 2 AC 128; [1992] 1 All ER 453
- ⁴⁴² [1985] Q.B. 428
- ⁴⁴³ (1998) QBD. U980659; at p 68 F – 70 A
- ⁴⁴⁴ *John v James* [1991] FSR at 458: As at end note 424. p 70 B et. Seq.
- ⁴⁴⁵ See page 97 above.

TABLE OF CASES

| | |
|--|---|
| <i>A Schroeder Music Publishing Co. Ltd. v Macaulay</i> [1974] 3 All ER 616 ---- | 2, 9, 34, 35 64, 65, 68, 73 - 88, 89, 90, 92, 99, 103, 106, 108, 118, 126, 130, 131, 132, 145, 162, 163, 164, 166, 167, 175, 180, 181, 182, 183 |
| <i>Alec Lobb Ltd. v Total Oil (Great Britain) Ltd.</i> [1985] 1 WLR 173 ----- | 182 |
| <i>Aylesford v Morris</i> (1873) L.R. 8 Ch. App 484 ----- | 53 |
| <i>Bank of Credit & Commerce International S.A. v Aboody</i> [1990] 1 Q.B. 923----- | 54, 61 |
| <i>Barclays Bank plc v O'Brien</i> [1994] 1 AC 180; [1993] 4 All ER 417, HL ----- | 61, 74 |
| <i>Barry McKay Int. Music (UK) Ltd. and L R Jackson v EMI Records Ltd.</i> (1985) -- | 19, 35 |
| <i>Bridge v Campbell Discount</i> [1962] AC 600 ----- | 50, 53 |
| <i>Carter v Boehm</i> (1766) 3 Burr. 1905 ----- | 93 |
| <i>CIBC Mortgages Plc v Pitt</i> [1993] 4 All ER 433 ----- | 98 |
| <i>Claygate v Batchelor</i> [1602] Owen 143----- | 182 |
| <i>Clifford Davis Management v WEA Records Ltd</i> [1974] 3 All ER 616 ----- | 62-65, 88 |
| <i>Creswell v Potter</i> (1968) [1978] 1 WLR 225----- | 53 |
| <i>Denmark Productions Ltd. v Boscobel Productions Ltd</i> (1967) 111 S.J. 715; [1969] 1 Q.B. 699 ----- | 111, 116 |
| <i>Esso Petroleum Ltd v Harper's Garage (Stourport) Ltd</i> [1965] 2 All ER 933; [1966] 1 All ER 725 [1967] 1 All ER 725 CA; [1968] AC 269 HL ----- | 72, 75, 77, 79, 81, 88 120, 147, 148, 162, 166, 182 |
| <i>Evans v Llewellyn</i> (1787) 1 Cox CC 333; 29 ER 1191 (Ch) at 193 ----- | 47, 53 |
| <i>Fry v Lane</i> [1888] 40 CL D 312 ----- | 50, 53 |
| <i>Gore v Gibson</i> (1843) 13 M & W 623----- | 55, 61 |
| <i>Gwynn v Heaton</i> (1778) 1 Bro. CC 1; 28 ER 949----- | 53 |
| <i>Harris v Richardson</i> (1877) 2 AC 814 HL----- | 70, 74 |
| <i>Harry v Kreutziger</i> (1978) 95 DLR (3d) 231 (BCCA) at 241 ----- | 53 |

| | |
|---|---|
| <i>Hart v O'Connor</i> [1985] ----- | 183 |
| <i>Herbert Morris Ltd. v Saxlby</i> [1916] 1 AC 688 700 and 707-708 ----- | 171, 182 |
| <i>Janson v Dreifontein Consolidated Mines Ltd.</i> [1902] A.C. 484----- | 170, 182 |
| <i>Lamare v Dixon</i> (1873) L.R. 6 HL 414 ----- | 47, 53 |
| <i>Levison v Patent Steam Carpet Company Ltd.</i> [1978] Q.B. 69----- | 95, 98 |
| <i>Lloyd's Bank v Bundy</i> [1974] 3 All ER 757 CA----- | 56, 61, 64, 96, 115 |
| <i>Matthews v Baxter</i> (1873) L.R. 8 Ex. 132 ----- | 55 |
| <i>Multiservice Bookbinding Ltd. v Marden</i> [1979] Ch. 84 at 110 ----- | 53 |
| <i>National Westminster Bank v Morgan</i> [1985] 1 All ER 821----- | 98 |
| <i>Nicholl and Another v Ryder</i> (1998) QBD U980659 1986 N 816 --- 55 - 59, 61, 66, 71, 74, 78, 88, 91, 92, 93, 118, 122, 123, 126, 130, 142, 156, 179 - 187 | 6, 11, 27, 29, 34, 35 |
| <i>O'Sullivan v Management Agency and Music Ltd</i> [1985] Q.B. 428----- | 62-67 |
| <i>Panayiotou v Sony</i> [1994] EMLR 229 ----- 88, 90, 91, 92, 110, 111, 112, 114, 116, 120, 126, 131 - 178, 179, 180, 181, 187 | 4, 11, 27, 30, 34, 35, 43, 49, 60, 61, 74, 78 |
| <i>Pao On v Lau Yiu Long</i> [1980] AC 614----- | 52, 53 |
| <i>Richardson v Mellish</i> (1824) 2 Bing. 229----- | 182 |
| <i>Samuel v Jarrah Timber & Wood Paving Corp. Ltd.</i> [1904] AC 323 ----- | 50, 53 |
| <i>Slaytor v Nolan</i> (1876) 11 IR Eq; 367----- | 48, 53 |
| <i>Tate v Williamson</i> (1866) L.R. 2 Ch. App 53----- | 54, 61 |
| <i>Vernon v Bethel</i> (1762) Eden 110; 28 ER 838 ----- | 53 |
| <i>Walford v Miles</i> (1992) 2 AC 128; [1992] 1 All ER 453----- | 88 |
| <i>Walters v Morgan</i> (1861) 3 D.F. & J. 718 ----- | 47 |
| <i>Warner Bros. Pictures Inc. V Nelson</i> (1937) 1 K.B. 209----- | 35, 89 |
| <i>Williams v Roffey Bros. and Nicholls (Contractors) Ltd</i> [1990] 1 All ER 512 --- 102, 106 | 100, 101 |
| <i>Zang Tumb Tuum Records Ltd. and Another v Johnson</i> , [1993] EMLR 61----- | 164, 179 |

TABLE OF STATUTES

Broadcasting Act 1990 34

Cable and Broadcasting Act, 1984 34

Competition Act 1980, Companies Act 1948, 1967,1976, 1980, 1981, 1985 34

Contract (Rights of Third Parties) Act 1999 40, 41
[See also Appendix 9]

Copyright Acts 1775, 1842, 1911 and 1956 11, 34

Copyright Designs and Patent Act 1988..... 34

Data Protection Act 1984..... 34

Data Protection Act, 1988..... 168

BIBLIOGRAPHY

- Adams J N & Brownsword R.; *Understanding Contract Law*; Second Edition; Fontana Press; 1994
- Atiyah P. S.; *The Rise and Fall of the Freedom of Contract*; Clarendon Press, Oxford; 1979
- Bagehot R.; *Music Business Agreements*; Waterlow Publishers; 1989
- Betts G. *Read Without Prejudice, George Michael*; UFO Music Ltd, London; 1997
- Brownsword et al.; *Welfarism in Contract Law*; Dartmouth Publishing Co.; 1994
- Burrows P. & Veljanovski C. G.; *The Economic Approach to Law*; Butterworths & Co. (Publishers) Ltd. 1981
- Campbell D. & Vincent-Jones P.; *Contract and Economic Organisation* (Socio-legal Initiatives); Dartmouth Press; 1996
- Chitty; *On Contracts; General Principles*; 26 Edition; Sweet & Maxwell; 1990
- Clark R. W.; *Inequality of Bargaining Power*; Carswell; 1987
- Dannen F.; *Hit Men, Power Brokers & Fast Money Inside The Music Industry*; Vintage; 1991
- Eichner A. S.; *The Macrodynamics of Advanced Economics*; M.E. Sharpe Inc. 1991
- Friedman L. M.; *Contract Law in America; A Social and Economic Case Study*; The University of Wisconsin Press, Madison & Milwaukee; 1965
- Greenfield S, Osborne G.; *Contract & Control in the Entertainment Industry*; Ashgate Dartmouth; 1998
- Horn N., Kotz H., Lesser H.G., *German Private and Commercial Law*: Tr. T. Weir; Clarendon Press, Oxford; 1982
- Pelling H.; *A History of British Trade Unionism*; Part One; Pelican, Penguin Books Ltd.; 1971
- Reiter B. J., Swan J., *Studies in Contract Law*; Butterworth & Co. (Canada) Ltd., 1980
- Rothenberg A. (M.D.); *Creativity & Madness, New Findings and Old Stereotypes*; The John Hopkins University Press; 1994
- Shelton R. *No Direction Home, The Life and Music of Bob Dylan*; Penguin Books; 1987
- Stanley H., Powell S., 'Can You Hear Me Mother?' *Sandy Powell's Lifetime of Music Hall*; Jupiter Books, 1975
- Treital G. H.; *The Law of Contract*; First, Second, Seventh & Eighth Editions; 1962 – 1996
- Tremlett G.; *Rock Gold, The Music Millionaires*; Unwin Hyman; 1990
- Williams G., *Learning the Law*; 10th Edition; Stevens & Sons; 1978
- Wigley J. & Lipman C.; *The Enterprise Economy*; Ed. A. Leake; Macmillan; 1992
- Yates D.; *Exclusion Clauses in Contracts*; Second Edition; Sweet & Maxwell; 1982

ARTICLE AND JOURNALS

- Abrahams P.; *SONY; Electronics group rules out counter-bid for EMI*; ft.com; 5 February 2000
- Ayres C.; *EMI merger – now the rock stars strike back*; Sunday-times.co.uk; 28 January 2000
- Bouw B.; *Cancon could be victim of music mergers*; Financial Post, National Post online; 25 January 2000
- Clark R. W.; *The Unconscionability Doctrine Viewed from an Irish Perspective*; 31 No. Ire LQ 114; (1980)
- Cope N.; *EMI may face stars' backlash against merger*; independent.co.uk/news/Business; 26 January 2000
- Eichner A. S.; *An Anthropogenic Approach to Labor Economics*; Eastern Economic Journal; October 1979;
- Enman S. R.; *Doctrines of Unconscionability In Canadian, English and Commonwealth Contract Law*; 16 Anglo-American Review; 1987; p 191
- Greenfield S. & Osborn G.; *Sympathy for the Devil, Contractual constraint and artistic autonomy in the Entertainment industry*; Media Law & Practice, Vol. 15; No. 4; 1994; p 117 - 127
- Greenfield S, Osborn G & Boon A; *Complete Control; Judicial and Practical Approaches to Commercial Music Contracts*; International Journal of the Sociology of Law; (Law and Popular Culture Special Issue).; Vol. 84; 1996; p 110.
- Hardingham L. J.; *The High Court of Australia and unconscionable dealings*; Oxford Journal of Legal Studies; Vol. 4; No 2; 1984; p275
- Heydon J. D.; *The Frontiers of the Restraint of Trade Doctrine*; 85 L.Q.R.; 1996; p 229
- Hovenkamp H.; *Law and Economics in The United States, a brief historical survey*; Cambridge Journal of Economics; Vol. 19; 1995; 331-352
- <http://www.timewarner.com>: Time Warner About Music, Warner Music Group
- Lynn M. & Olins R.; *Music Giants Tremble as George Battles Sony*; The Sunday Times, Business; 17 October 1993; p7
- New Review; *Oh Lord Please Don't Let Me Be Misunderstood / Profile George Michael*; The Sunday Times; 24 October 1993
- Palmer N.; *Implications of the George Michael Case*; Solicitors Journal; 29 July 1994; p 772 –3
- Palmer N.; *Lengthy Contractual Agreements*; International Media Law; Vol. 12; August 1994; p 63
- Parker N., Lee & Thompson; *Risk & Reward for Artists Managers*; International Media Law; Vol. 12; July 1994; p 51
- Parson T. *Back After Five Years in Hell; George Michael Talks To . . .*; Daily Mirror; 2 January 1996
- Parson T.; *Dates Bring Tears To My Eyes*; Daily Mirror; 3 January 1996
- Pierce A; *Singer Denies He Broke Promise To Get His Own Way*; The Times; 29 October 1993
- Scoggins M.; *Bad Law or Bad Judges?*; Ent. L.R.; Vol.6; 1993 p 163
- Slayton; *The Unequal Bargain Doctrine*; 22 McGill L.J. 94 (1976)
- Usborne D.; *Quiet Rocker, High Roller*; The Independent; Business Review; 16 February 2000; p1
- Whittstock M.; *Losing Faith*; The Times Magazine; 2 October 1993; p 12

REPORTS

Dti; The unfair terms in consumer contracts regulations 1994 (SI 1994 No 3159); Guidance Notes; Annex II, Material as to good faith.

The Law Commission for England and Wales; Law Commission Report 242; Privity of Contract: Contracts for the Benefit of Third Parties

House of Commons Standing Committee; Second Reading Committee; 29 June 1999; Contracts (Rights of Third Parties) Bill [Lords]; Second Reading Committee Debates.

INDEX of APPENDICES

| | Page |
|---|-------------|
| TABLE of CASES | 188 |
| TABLE of STATUTES | 190 |
| BIBLIOGRAPHY | 191 |
| ARTICLES and JOURNALS | 192 |
| REPORTS | 193 |
| | |
| APPENDIX 1: Relevant (Influential) Law from Overseas Jurisdictions | 194 |
| 2: Economics Theories and Approaches | 199 |
| 3: Scientific and Socio-psychology; Support Used to Develop the Views and Arguments Given | 204 |
| 4: Study of Personality Traits | 211 |
| 5: The Term ‘Entrepreneur’ | 212 |
| 6: Sample Biographies of Music Industry Executives | 214 |
| 7: The Nature of Record Companies | 220 |
| 8: Third Party Rights | 224 |

Relevant (influential) Law from Overseas Jurisdictions

After some consideration, it was decided that there would be no specific comparison between English and other approaches at law within the main body of this work. To have done so could have brought unnecessary complexity to this area of study. It is believed that such a comparison should be the subject of further, future application. For example, developments arising from the future effects of the new Contract (Rights of Third Parties) Act 1999, would necessitate a full analysis of comparative law as studied by the Law Commission in preparation for Report 242. However, the following, brief descriptions are given because it felt that the modicum of understanding and the impression of alternative approaches gained while reviewing these possibilities prior to embarking on the main discourse here, will have influenced and to some degree affected what has been written. It is believed that conclusions and presumptions are inevitable when hypothesising, thus it was felt prudent here to include an outline of potential influences.

Australia may have the most extensive application of the equitable doctrine of unconscionability. A leading case *Commercial Bank of Australia v Amadio (1983)* states the proposition that the doctrine will be invoked:

*Whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created.*⁴⁴⁶

Proof that *this* doctrine (rather than those actually turned to in the UK) would be brought into play in Australia, is found in *Amadio*⁴⁴⁷ where Mason J. went on to explain:

*. . . entry into a standard form of contract dictated by a party whose bargaining power is greatly superior, a relationship which was discussed by Lord Reid and Lord Diplock in A Schroeder Music Publishing Co v Macaulay [1974] . . See also Clifford Davis Management Ltd. v W.E.A. Records [1975]. . In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstance.*⁴⁴⁸

In short, the Australian proposition appears very much like an extension of the doctrine of *undue influence*. In fact in cases of commercial transaction it enables the court to make decisions which are beyond the intention, and therefore the philosophical structure of *undue influence*. It is not a prerequisite that the weaker party suffers loss or detriment through the bargain⁴⁴⁹ and *inadequate consideration* is considered in the context of evidence of proof on the part of the plaintiff, i.e.: it is not a *sine qua non* for relief. Also, Hardingham points out, the Australian court does not recognise the subsidiary principle of *equality of bargaining power* per se, it concentrates on the unconscionability of the contract itself and allows the position of the parties to substantiate, or disprove, the plaintiff's claim.

This seems to leave the judiciary with a great level of discretion and it could be suggested that a doctrine of this kind, operated in this manner, will not bring clarity and certainty in a way that the 'general contracting publics' can relate to.

Canada operates a similar doctrine of unconscionability to that of the Australian courts - although it does not have such a broad and general application. Crawford⁴⁵⁰ claims that:

... the scope of the jurisdiction is extremely difficult to define.

The leading case here is *Waters v Donnelly*⁴⁵¹ where the doctrine was set out. The criteria are essentially that the plaintiff was *overmatched, overreached, without advice and made a most improvident exchange* - his general condition being *ignorance and want of skill*. The judiciary relied in part on an Irish case: *Slator v Nolan*⁴⁵² and the reasoning of Sullivan M.R. which incorporated *distress or recklessness, or wildness or want of care*, which he described as being circumstances which might lead to an *unconscionable bargain*.

Enman's suggestion is that the Canadian doctrine, which was developed before the "poor and ignorance" test in English jurisdiction,⁴⁵³ is not as narrow as the English counterparts. In addition the Canadian judiciary are not as reserved in applying such a principle. He suspects that UK law would show reluctance in applying its' "narrow principle" (by which he, presumably, actually means *equality of bargaining power*).

To substantiate this, Enman cites *Harry v Kreutziger*⁴⁵⁴ a case concerning a mild and inarticulate American Indian who:

. . . sold his 6-ton fishing boat along with its license, largely on the assurance by the buyer that as an Indian he would have little difficulty in obtaining another fishing license. That statement was untrue but in addition the Indian had a hearing defect, . . . was not widely experienced in commercial matters and with little education.

McIntyre JA in this case said:

In my opinion, questions as to whether the use of power was unconscionable, an advantage was unfair . . . a consideration was grossly inadequate or bargaining power was grievously impaired . . . are really aspects of one single question. That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality . . . the framing of the question in that way prevents the real issue from being obscured by isolated consideration of a number of separate questions

Despite McIntyre's apparent clarity, it is submitted that what the English judiciary are shying away from, is what they perceive as a level of uncertainty concerning the boundaries of rules.

America comes close to being able to operate a principle similar to that in Germany, through the Uniform Commercial Code s 2-302:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract. . . ⁴⁵⁵

Beale suggests that, although Article 2 of the UCC applies only to transaction of goods, the courts have applied an analogous doctrine to other contracts. Restatement 2d s 208 adopts a similar provision for general application to any contract. Thus it can be said that the US courts have approached the application of the code, in dealing with unconscionable

transactions, in much the same way as the Germans have with ss 242 BGB - research conversations reveal that application of the rule of unconscionability is liberal in the US. General opinion is that where an individual is in dispute with a commercial organisation the courts will favour the individual (recognisably pursuing *equality of bargaining power*).⁴⁵⁶

European courts, on the other hand, have a quite different approach, in that the rules of law are set out in codified form. The most prominently effective of these being the German version where the structure is as follows: ⁴⁵⁷

The principle attached to formation of contract (*Willenserklärung*) is the declaration of the *will* of the parties (i.e.: what was *intended*). German courts recognise two aspects - the *objective* in what was actually expressed, and the *subjective* in what was intended. They recognise that there may be a *defect of intention* (*Willensmangel*), under certain circumstances which may justify rescission of the contract. For example, ss 133 BGB provides that 'in interpreting a declaration of will one must seek out what was really intended and not adhere to the literal meaning of the words used. . . ⁴⁵⁸- this is closely analogous with UK rules of interpretation. Similarly ss 123 provides that 'the declarer (of his will)'s freedom of choice may be affected by deceit or unlawful duress. Again this is analogous with UK rules of *mistake, duress* etc.

The most important sections, which do not seem to be echoed in UK law are: ss 138 par 2 BGB which provides that 'To exact a promise of an unfair economic advantage by exploiting the inexperience or need of another is ineffective,' (as discussed above the UK has nothing so precise), and ss 138 par 1 BGB which provides that 'A legal transaction is void if it is contrary to good morals'. The scope of this as a doctrine may be beyond definition in UK terms as questions of morality are habitually avoided by the judiciary. Examples include: RGZ 86, 296 which discusses exploitation through disproportionate counter presentations, and BGHZ 22, 347, 355 which illustrates contracts which expressly restrict personal and economic freedom of movement, or BGHZ 55, 34, 35 (1970) contracts which benefit the creditor to the undue detriment of others.

What is important, is that this German legal philosophy and code will be operated in conjunction with ss 242 BGB 'The debtor is obliged to perform in such a manner as good faith requires, regard being paid to general practice' - the *Principle of Good Faith*. According to Horn *et al*, in setting out ss 242, it was the purpose of the legislator to:

*. . . make people conscious of the true content of the contractual obligation, . . . a 'principle of legal ethics', which dominates the entire legal system.*⁴⁵⁹

It must be supposed here, that the clarity and succinctness of codification is required before such principles can operate successfully. Such a principle is certainly lacking in English law.

END NOTES

⁴⁴⁶ per Mason J.; at 363: Source: Hardingham; See Ox J.L .S (1984) 4; p 275

⁴⁴⁷ *ibid.* at 364

⁴⁴⁸ own emphasis

⁴⁴⁹ per Deane J *ibid.* at 369

⁴⁵⁰ (1966), 44 CBR 142 at 146: Restitution - Unconscionable Transactions - Undue Advantage Taken of Inequality Between Parties

⁴⁵¹ (1884), 9 OR 391 (Ch): still relied on in later decisions. Source S. R. Enman; *Doctrines of Unconscionability in Canadian and Commonwealth Contract Law*(1987) 16; Anglo-Am LR, p191 et seq

⁴⁵² (1876) 11 IR. Eq. 367

⁴⁵³ e.g.: *Waters v Donnelly* (1884) - *Fry v Lane* (1888) 40 Ch. D. 312

⁴⁵⁴ (1978), 95 DLR (3d) 231

⁴⁵⁵ Source H. G. Beale; *Contract Cases and Material*; Butterworths; 1990 p 673.

⁴⁵⁶ For further comment on general application of UCC s2-302 see Appendix 7.

⁴⁵⁷ BGB = Civil Code enacted 18.1.1896; RGZ = Imperial Supreme Court (Civil Cases) Reports; BGHZ = Reports of Civil Cases decided by Supreme Court, Ordinary Jurisdiction

⁴⁵⁸ Source Horn, Kötz and Leser; "German Private and Commercial Law" Clarendon Press; 1982; p75 et seq.

⁴⁵⁹ Chapter 8, p 135.

Economics Theories and Approaches

The work which has been done here has not strictly followed the discipline of 'law and economics' *per se*. It is more true to say that writings and commentaries derived from that discipline, and discovered during reading and research, have influenced beliefs and conclusions.

Reference is made to those more direct influences within the main body of the text, so it is the purpose of these notes is to embellish those references, and to inform the reader of the kind of materials and analysis leading to their inclusion.

The concept of economics based approaches to academic analysis to various fields of law has had peaks and troughs of popularity during the last four decades. However, Herbert Hovenkamp⁴⁶⁰ traces the origin of the practice back

. . . at least as far as Daniel A Raymond's "The Element of Constitutional Law and of Political Economy", first published in 1840

As far as influences from American sources are concerned, there would be no need to look further than the Chicago University publications initiated by Ronald H. Coase's *The Problem of Social Cost* of 1960.

Once intellectual attention has been drawn to law and economics of the Chicago school, then a regime of neo-classical and anti-neoclassical theories become apparent. That is to say, those economists who base their conclusions on a precursory assumption of zero transaction cost, compared with those whose precursor is that there will be costs which should be the fundamental core of the study.⁴⁶¹ From that respect it can be supposed that this thesis has adopted an anti-neoclassical approach in that it has been the long-term costs (personal, social, industry-wide as well as financial) of the conduct and occasional breakdown in long-term music industry contractual relationships which have been of concern. It must be said that if this has not been a deliberate attempt to follow any specific economic school.

The traditional difficulty attributed by some to utilising economics methodologies is that the assumptions of economists tend to allow only for perfect markets with perfect market information. Fragments and fractions may be ignored or falsely represented so that the economist's conclusion can never be realistic. Coase⁴⁶² has led Hovenkamp to allow that:

*Transaction costs must be defined broadly to cover externalities, or third party effects and any impediments to bargaining that might result from the status of the participants as bilateral monopolists. [-] Failures resulting from imperfect information are also generally regarded as transaction costs.*⁴⁶³

There can be no doubt of the relationship between the quotation given above and the material of this thesis. However, this is not considered the place to examine whether it is the framework of legal approaches (such as the rules and rights historically attributed to third parties who fall within the sphere of any contract, or inequality of bargaining power, or the rules about mis-representation which have grown through English common law practice) which has influenced the economists' development of thought, or vice-versa. It is doubted here that academic economic theorum have had such a persuasive effect on the structure of law. It is thought here that the economics based approaches have provided convenient classification and points of reference from which to view and compare business activities such as formation of contract. Long-term contract based relationships in the music industry span economics theories and legal rule-making as if the industry were a test-tube experiment.

The introduction of economics based approaches to this research was Trebilcock's analysis of whether an aspiring artist is faced with a monopoly, (i.e. the few major record companies) when he seeks to gain a recording contract.⁴⁶⁴ Trebilcock drew the conclusion, which is agreed with here, that there are sufficient subsidiary and independent companies within the industry, along with varied self-promotion options, to negate the monopoly or oligopoly argument against this industry. It is also thought here that the standardised industry contract, while generally produced by the corporate party, is sufficiently open to negotiation, influence and variation, so that it cannot be described as a take-it-or-leave-it policy of contracting, except inasmuch as the creative parties show a tendency to avoid taking time to influence its content. This is seen as a

behavioural trait specific to both the creative and the corporate parties which will be influenced by psychology and governance rather than economics considerations. Thus the effects of music industry contracting practices may have economics repercussions, but the cause and fix are beyond the ambit of economics considerations. The economist must assume a starting point, and it invariably appears to be focussed at the moment of agreeing royalty percentages and exchanging signatures. A point of transaction. This ignores the initiation of motivation, drive and desire to become bound into the music industry via contract. See, for example, the opinions and relationship between Shaun Ryder and his managers.⁴⁶⁵ Costs and damages were potential before any such point of transaction was reached.

Having recognised economics methodology as a suitable source for analytical treatment here, it was decided to explore Eichner's Anthropogenic model. Eichner Says:⁴⁶⁶

The Anthropogenic model does not deny the importance of exchange, especially with respect to supplying the material needs of the population under the economic systems that have evolved in all but centrally planned socialist countries. However, it sees exchange as only one of four processes that may characterise any particular social activity. Exchange is, to be sure, the process quintessential to the economic dimension of society, but the economic dimension itself is but one of four such dimensions each with its own characteristic process or dynamic. The other three dimensions beside the economic that need to be taken into account in any comprehensive analysis are 1) the normative; 2) the political; and 3) the human developmental, or anthropogenic. The normative dimension encompasses all the values or beliefs upon which individual activity is predicated . . . The political system, meanwhile encompasses all the mechanisms that exist for making conscious social choices amongst alternative courses of action. . . . what is novel about the conceptual framework upon which the human resources approach is based is the delineation of the human developmental or anthropogenic dimension of society. This specification derives from the conviction that human competencies, defined as the ability to utilise various skills in a social setting, are no less important than norms, societal decision (including laws), and material goods in the functioning of societies. [-]

The anthropogenic process involves successive, or complementary, affiliation with developmental institutions, beginning with the family, continuing through the various levels of schooling, and then consolidating around the experience gained through employment.

He continues to explain that it is the economic and political systems which structure the normatives and dictate the career path of the anthropogenic dimension, but that the anthropogenic development in turn is dynamic, so that it evolves the development of politics, economics and norms according to upbringing, schooling, career experience and so-on.

The detail given in Appendix 9 shows a clear group of music industry executives who, while each is distinctive in himself, fall into a certain anthropogenic trail from Brooklyn to music row via law school. Artists, however, are diverse and an anthropogenic overview will not group them except broadly and with too many generalisations. This supports what is believed here, that music industry executives are a labour force, or group, of human resource in Eichner's terms. It is interesting to note that Eichner uses anthropogenics to expand the traditional view of employment. He regards it not as an instant contract with both parties perfectly informed, but rather as a prolonged process which begins with an extended period of recruitment activities on the part of the employer (which part could be supplemented by the corporate party in the music industry) and a search on the part of the employee (which part could be supplemented by the creative party). This moves on the meeting and the selection process, each of the other, a period of orientation and indoctrination, assignment to a specific task and finally education or learning and training leading to evaluation and perhaps promotion. This model approach to viewing relationships is of much value and influence to the work done here, as it is felt that this is sufficiently similar to the process undergone during a long-term contractual relationship of the kind demonstrated by the music industry. The period of learning for a creative party may tend to be self-teaching and development. Evaluation and promotion or improvement of the terms for an artist may be a frequent event as demonstrated by the re-negotiations by George Michael during his relationship with CBS/Sony following periods of success.

The remainder of Eichner's discussion is given to American labour groups and human resources, but his methodological approach has proved constructive within what has been built up here.

What remains to be said here, is that of the connection between economics studies and contract law it has been John Wigley and Carol Lipman's *The Enterprise Economy*⁴⁶⁷ which encouraged the decision to recognise both parties to music industry contracts as *entrepreneurs*. There is further discussion on this point at Appendix 5.

END NOTES

⁴⁶⁰ *Law and Economics in the United States: a brief historical survey*; Cambridge Journal of Economics; vol. 19, 1995; 331-352.

⁴⁶¹ *ibid.* 334 et seq.

⁴⁶² *Notes on the problems of social cost; The Firm, The Market and The Law*; University of Chicago Press 1988; p158-161

⁴⁶³ *Law and Economics in the United States: a brief historical survey*; Cambridge Journal of Economics; vol. 19, 1995

⁴⁶⁴ See p 82 supra at note 185.

⁴⁶⁵ Supra p 179 et seq.

⁴⁶⁶ Eichner A. S.; *The Macrodynamics of Advanced Market Economics*; M. E. Sharpe, Inc.; 1991; p 868. *An Anthropogenic Approach to Labor Economics*; *Eastern Economic Journal*; October 1979.

⁴⁶⁷ Wigley J. and Lipman C.; *The Enterprise Economy: Economics Today*; Macmillan; 1992

Scientific and Socio-psychology; Support Used to Develop the Views and Arguments Given:

Throughout this discourse artists, lyricists and composers have been commonly described as “creative parties”. Inherent in this description are a number of assumptions based on an acquired understanding of creativity and those who are creative. It is felt that it is of value here to examine the sources of those assumptions. In addition to discussing source, material justification for what has been assumed will be given.

It must also be noted that the given assumptions will, inevitably, have affected interpretation and analysis of the nature and characteristics of those who constitute the music industry. (See chapter 13 et. Seq.)

1: Rothenberg, Albert; M.D. *Creativity and Madness – New findings and old stereotypes*⁴⁶⁸

Prior to writing the book which has been selected for self-education here, Rothenberg compiled and published a two volume bibliography listing 9,968 titles of books and articles which are scientific writings about creativity⁴⁶⁹ (in the context in which it is used here). He had spent some 25 years studying the creative process and the selected book, *Creativity and Madness*, is explicit of his findings. At that time he had conducted more than 2000 hours of interviews⁴⁷⁰ with relevant and co-operative subjects.

In his summary of general findings he gives a report which corroborates the conclusions of the Myers-Briggs type indicator castings which have been carried out here, particularly on the matters of idealism, attitudes to authoritarianism, attitudes to judgement and taste and the response of creative parties to areas of inconsistency. His report reads:

From all of these researches, I can report a very clear conclusion that some factors underlie all types of creativity; there are common psychological factors operating in varying types of creative processes in art, science and other production fields. (Rothenberg includes music and poetry in his fields of study) These common factors consist particularly of special types of thinking patterns

used by creative persons during the process of creation itself [-] I shall first report some generalisations about creative people derived from my data. First, contrary to popular as well as professional belief, there is no specific personality type associated with outstanding creativity. Creative people are not necessarily childish and erratic in human relationships, as is often thought, nor are they necessarily extraordinarily egoistic or rebellious or eccentric. Second, I must emphasise that, surprising as it may seem, creative people are actually not all exceptionally intelligent, speaking of intelligence in the commonly accepted meaning of performance on verbal I.Q. tests. Many outstanding artists, writers, architects and other types of creators are only slightly above average intelligence. There is, moreover, no uniform personality style, if we speak of it in a technical psychological sense. (Hence the natural variations in the responses to the MBTI casting done here. The subjects have been type cast according to majority response.) Creators are neither generally compulsive nor impulsive, although many – even highly outstanding ones, interestingly – are somewhat rigid, meticulous, and perfectionist rather than free and spontaneous. (Although 67% of those who responded to the MBTI casting here, claimed to be more spontaneous than deliberate, there was a 50% split about whether the structured and scheduled is more appealing than the unstructured and unscheduled. Also 53.33% said that they prized a strong sense of reality more than a vivid imagination.) Some degree of introversion – inwardness and self preoccupation does predominate among creative people in many fields, but some are surprisingly extrovert. (31.25% of the MBTI (Myers-Briggs Type Indicators) casting here, showed a predominance of introversion preferences.) There is generally a good deal of idealism and striving for an ideal in their work, but there is neither a characteristic ideological position nor political affiliation. (This is felt here to be reflected in the tendency in music industry creative parties to vehemently desire a change in direction as their confidence grows, they adopt a particular style in their work which often leads to disputes with those who are trying to advise on management and control of their career. The most explicit example of this is George Michael and his swing toward adult rock and jazz.) Authoritarianism tends to be despised, but there is inconsistency

because some creative parties are rather authoritarian about matters of judgement and taste. (See last comment) Few of us – creative or not – tend really to like authoritarianism and are sometimes inconsistent, so there is no particular difference in this group. Only one characteristic of personality and orientation to life and work is absolutely, across the board, present in all creative people: motivation.⁴⁷¹

It is felt critical to note at this juncture that these last few comments of Rothenberg's reflect the suggestions of the Myers-Briggs ENFP type, as per the majority of the group studied for this research. In addition MBTI demonstrates preferences and comfort zones rather than absolutes, so it can be said that all people can go through an ENFP, or any other, type phase, in accordance with their instant conditions and circumstances. The purpose of the questionnaire was to draw out preferences and to show that a group or group majority share these preferences and are, therefore, of a type. Through out the cases discussed for this research it has been the *motivation* of the artists which has driven them, with blind faith and determination, to a position where they could enter into the long-term contractual relationships. This motivation is largely what has driven them to litigate in order to be able to support their ideals elsewhere and further their desired career path.

Rothenberg makes it clear that he believes that creativity, as a behavioural setting, is learned and influenced by upbringing and environment rather than being a genetic trait. The core of his project is the analysis of the link, or relationship, between creativity and psychosis. Many, though by no means all, creative people suffer psychosis of one form or another. On the matter of whether certain behavioural traits are genetic or learned is of little relevance to this study of the music industry on the proviso that it is accepted that when proposing an improved relationship of understanding between creative party, corporate party and judicial party all or any will have to be capable of broadening, reducing or otherwise adjusting some behavioural responses in order that the improved relationship may be carried on. Even if the original traits are 'in the blood', so to speak, it is assumed that the power of human reasoning and decision making are enough to effect suitable, learned alterations towards contractual relationship management. If all

the traits under question are learned and/or affected from the personal environment, then the quicker better governance's are in place the better.

In analysing the creative thought process, which personal experience here supports will be as applicable to a performing musician who has not composed the work he is reproducing, Rothenberg touches on the matter which non-creative people describe as the 'magic' or the distinction between the artistic and themselves. That is the unusual types of conceptualisation to which the artist is subject. He says:

*. . . I think it is precise to say that the processes transcend the usual modes of ordinary logical thought. Therefore, I refer to them as translogical types of thinking.*⁴⁷²

He continues to give numerous instances from his research, showing what he calls the Janussian process, by which the artist will receive as one several concepts which are at juxtaposition or are diametrically opposed, or the single conceptualisation of simultaneous antithesis. While the Janussian cognitive process is very much an idea generating form, Rothenberg then offers up evidence for what he calls homospatial thought process:

. . . conceiving two or more discrete entities occupying the same space, a conception leading to the articulation of new identities. (Similar to metaphorisation)

on the matter of "inspiration" Rothenberg is quite clear and his views are concurred with here. A flash of inspiration is a rare event, his studies show that meaning and purpose unfold during the creative process rather than initiating it. Although mood and cognitive reasoning do initiate the work these do not equate with "Aha! – Eureka!" type inspiration. The event is more likely to be one of coming to understand or re-interpret what is being created, the actual creation process being rather more deliberate and controlled.

His studies also reveal that creative parties themselves are responsible for publicly perpetuating the myth of their being special in that they are *gifted* to receive

‘inspiration’ and act on it regularly enough for it to be the underpinning of their career. After all, an artist must be more valued and valuable if he has the gift of inspirations which the rest of us lack. Rothenberg also questions the possibility of mind altering drugs or alcohol being able to make an artist more receptive to inspiration. He thinks not. In terms of the research here, it is observed that drugs or alcohol make the parties more receptive to peaks and troughs of emotion and a heightened awareness of such is often the basis of a well written song or of a strong, interpretative performance. The same can, however, distort the creative party’s perception and lead to the creation and production of nonsense or poor quality material which will damage the career.

The question of altered mind state leads to Rothenberg’s next point which is the belief in the unconscious creative ‘wellspring’. In short, Rothenberg confirms what was already believed here, that the unconscious (sub-conscious) cognitive workings compliment the conscious workings, neither can function at almost any task, without the operation of the other.

In discussing homosexuality or bisexuality and creativity, Rothenberg interestingly remarks:

. . . homosexual persons often find themselves discriminated against or excluded and on the outside fringe of their society, a condition social scientists call being “marginal”. This marginality (also a factor for Jews, ex-patriates, disabled people and, perhaps, younger siblings) seems to have something to do with a persons learning to tolerate ambiguity, project varying points of view and strike out in new directions – factors that seem to play an important role in creative orientation and ability. . . . there are to date no known statistical bases for assuming that homosexuals are more successfully creative than heterosexuals.

Specifically, on the performing arts, he adds:

. . . , as male homosexuals are still subject to social disapproval, they often find acceptance in and are more attracted to publicly visible artistic fields . . . Also, psychological tendencies to exhibitionism which frequently found in homosexual males seem to play a role.⁴⁷³

Toward his conclusion Rothenberg asserts that:

*Deviant behaviour, whether in the form of eccentricity or worse, is not only associated with persons of [-] high level creativity, but is frequently expected of them. Creative persons themselves have said or done little to disavow this conception and expectation, and several outstanding ones have even formulated precepts about it.*⁴⁷⁴

2: Other sources of influence:

In addition to Rothenberg there are, of course, other sources which give insight to methodology for studying human behavioural patterns. Among them; Laurie J. Mullins⁴⁷⁵ who provides a descriptive narrative of study techniques. Of particular interest here is the method of *nomothetics*.⁴⁷⁶ This is a generalisation which can be seen to cover the technique primarily used in research here, as nomothetic approaches are based on the practice of the collection of group data. Theorists are recognised as having captured group data which displays evidence of particular personality traits in order to draw comparisons between individuals. The purpose of the approach is to be able to predict behaviour. Environmental and social influences are viewed as minimal influences, while personality traits are viewed as constant. Mullins says:

Researchers closely align themselves to studies which are 'scientific' in a positivistic sense. (The term positivism refers to a branch of science which is exclusively based on the objective collection of observable behaviour – data which are beyond question.) Such approach transfers methods used in natural sciences to the social world.

What has come to be believed here is that personality traits are, as suggested, consistent. However, the chosen preference for anthropogenics to give an overview of the results of what has been observed denies the nomothetics suggestion that environment and social influences are of minimal importance. The fact that high level industry executives fall in to such a clear group can be directly linked to their upbringing, heritage and education. In his book, *Rock Gold*, Tremlett⁴⁷⁷ explains:

*The publishing and agency side of the business had its roots in music hall. Most of the key figures were Jews, mainly of immigrant or East End working class origins, who began their careers treading the boards.*⁴⁷⁸

Lew Grade for an example had started off as a music hall dancer. The family name was Wynogradsky, they were refugees from Poland. Tremlett continues:

Coming from the music hall background, with so many agents having been either dancers, musicians or performers, there was another in-built discipline: a respect for timing, routine and the needs of other artists.

Interestingly, Beatles manager Brian Epstein trained at RADA, so he too knew the disciplines of theatre work.

END NOTES

⁴⁶⁸ The John Hopkins University Press; 1994

⁴⁶⁹ *ibid.* p7, para. 1

⁴⁷⁰ *ibid.* p7, para. 2

⁴⁷¹ *ibid.* p8 et. Seq.

⁴⁷² *ibid.* p11 et. Seq.

⁴⁷³ *ibid.* p106 et. seq.

⁴⁷⁴ *ibid.* p 149

⁴⁷⁵ *Management of Organisational Behaviour*, 4th Ed.; Pitman Publishing; 1996

⁴⁷⁶ *ibid.* p104

⁴⁷⁷ Tremlett G., *Rock Gold, The Music Millionaires*; Unwin Hyman; 1990

⁴⁷⁸ *ibid.* p 8. See also Appendix 6 post.

Study of Personality Traits:

The comments here are intended to demonstrate the philosophical concepts of the Myers-Briggs Type Indicator® applicable to this research.

Katherine Briggs and Isabel Briggs Myers converted Jung's theory that personality is the relatively stable set of traits that produce stability in behavioural patterns. They created a test and scale which enables groups of people to be classified for comparative research purposes.

Dr David W Keirsey extended this work and developed a set of test questions. A copy of the questionnaire based on that development and used to test a sample of music industry aspirants for this research is also included.

The term Extraversion is used to refer to those groups of people who tend to spend the majority of their time interacting with others and drawing energy from that interaction. Conversely, Introversion will indicate those who prefer to stand-alone and will spend much time in deep thought. It is important to be aware that introversion is not synonymous with shyness or dislike of company. All people spend some time in one or other of these states of mind and all people have a preferred state.

Sensing and Intuition. Jung suggested that there are two ways of dealing with information which surrounds and impacts on people all day every day. Sensing refers to the absorption of data through the five senses, while intuition refers to the abstraction and analysis of possibilities from sources and factor of information and data. Again all people will utilise both sensing and intuition at different times and each has a natural, preferred state.

Thinking and Feeling. Jung felt that people make decisions on the basis of one of two criteria: rational, logical, impartially and with reasoning will be categorised as thinking, while decisions based on personal values or private beliefs are generally classed as feeling. As with each of these categories people spend some time in one or other of these states of mind and all people have a preferred state.

Finally, Judging and Perceiving. Those whose preference is judging will have a tendency to be neat, extremely organised, orderly, perhaps fond of lists and schedules. Those whose preference is perceiving have a tendency to be flexible and spontaneous, make decisions as they go along and respond to instant situations.

MBTI® and Myers-Briggs Type Indicator® are registered trademarks and Myers-Briggs™ is a trademark of the Consulting Psychologists Press, Inc., the publishers of the MBTI instrument.

There are many texts, catalogues and sources, including those on the internet, which give good discussion and information on this subject.

The Questionnaire:

Candidates – please tick your selected response, A or B next to the question

e.g. 1. At a party do you – (you mark A or B here:-)

- ✓ A) interact with
- B) interact with a

This indicates that you are rejecting option B and are saying 'yes' to, or accepting option A.

Please do not take up a lot of time answering these questions – respond instinctively.
Thanks.

1. At a party do you –

- A) interact with many people including strangers
- ✓ B) interact with a few who are already known to you

2. Are you more –

- A) realistic than speculative
- ✓ B) speculative than realistic

3. Is it worse –

- A) to have your "head in the clouds"
- ✓ B) to be "in a rut"

4. Are you more impressed by –

- A) principles
- ✓ B) emotions

5. Are you more drawn towards -

- ✓ A) the convincing
- B) the touching

6. Do you prefer to work -

- A) to deadlines
- ✓ B) just "whenever"

7. Do you tend to choose -

- A) rather carefully
- ✓ B) somewhat impulsively

8. At parties do you -

- ✓ A) stay late and gather increasing energy
- B) leave early feeling yourself running out of energy

9. Are you more attracted to -

- A) sensible people
- ✓ B) imaginative people

10. Are you more interested in -

- A) what is actual
- ✓ B) what is possible

11. In judging others are you more swayed by -

- A) laws than circumstances
- ✓ B) circumstances than laws

12. In approaching others is your inclination to be somewhat -

- A) objective
- ✓ B) personal

13. Are you -

- ✓ A) punctual
- B) leisurely

14. Does it bother you more to have things -

- ✓ A) incomplete
- B) completed

15. In your social groups do you –

- A) keep abreast of other's happenings
- ✓ B) get behind on the news

16. In doing ordinary things are you more likely to –

- A) do it the usual way
- ✓ B) do it your own way

17. Writers should -

- ✓ A) "say what they mean and mean what they say"
- B) express things more by use of analogy

18. Which appeals to you more –

- ✓ A) consistency of thought
- B) harmonious relationships

19. Are you more comfortable in making –

- A) logical judgements
- ✓ B) value judgements

20. Do you want things –

- A) settled and decided
- ✓ B) open to change and undecided

21. Would you say you are more –

- A) serious and determined
- ✓ B) easy-going

22. In phoning do you –

- ✓ A) rarely question that it will all be said
- B) rehearse what you'll say

23. Facts –

- ✓ A) "speak for themselves"
- B) illustrate principles

24. Are visionaries –

- A) somewhat annoying
- ✓ B) rather fascinating

25. Are you more often –

- ✓ A) a cool-headed person
- B) a warm hearted person

26. Is it worse to be –

- ✓ A) unjust
- B) merciless

27. Should one usually let events occur –

- A) by careful selection and choice
- ✓ B) randomly and by chance

28. Do you feel better about –

- ✓ A) having purchased
- B) having the option to buy

29. In company do you –

- ✓ A) initiate conversation
- B) wait to be approached

30. Common sense is -

- A) rarely questionable
- ✓ B) often questionable

31. Children often do not –

- ✓ A) make themselves useful enough
- B) exercise their fantasies enough

32. In making decisions do you feel more comfortable with –

- A) standards
- ✓ B) feelings

33. Are you more –

- ✓ A) firm than gentle
- B) gentle than firm

34. Which is more admirable –

- A) the ability to organise and be methodical
- ✓ B) the ability to adapt and make do

35. Do you put more value on –

- A) the definite
- ✓ B) the open-ended

36. Do new and unexpected meetings with strangers –

- ✓ A) stimulate and energise you
- B) tax your reserves

37. Are you more frequently –

- A) a practical sort of person
- ✓ B) a fanciful sort of person

38. Are you more likely to –

- A) see how others are useful
- ✓ B) see how others see

39. Which is more satisfying --

- ☒ A) to discuss an issue thoroughly
- B) to arrive at an agreement on an issue

40. Which rules you more --

- A) your head
- ☒ B) your heart

41. Are you more comfortable with work that is --

- A) contracted
- ☒ B) done on a casual basis

42. Do you tend to look for --

- A) the orderly
- ☒ B) whatever turns up

43. Do you prefer --

- A) many friends with brief contact
- ☒ B) a few friends with more lengthy contact

44. Do you go more by --

- A) facts
- ☒ B) principles

45. Are you more interested in --

- ☒ A) production and distribution
- B) design and research

46. Which is more of a compliment --

- A) "there is a very logical person"
- ☒ B) "there is a very sentimental person"

47. Do you value in yourself more that you are –

- A) unwavering
- ✓ B) devoted

48. Do you more often prefer the –

- A) final and unalterable statement
- ✓ B) tentative and preliminary statement

49. Are you more comfortable –

- ✓ A) after a decision
- B) before a decision

50. Do you –

- A) speak easily and at length with strangers
- ✓ B) find little to say to strangers

51. Are you more likely to trust your –

- A) experience
- ✓ B) hunch

52. Do you feel –

- ✓ A) more practical than ingenious
- B) more ingenious than practical

53. Which person is more to be complimented –

- A) some one of clear reasoning
- ✓ B) some one of strong feeling

54. Are you more inclined to be –

- ✓ A) fair minded
- B) sympathetic

55. Is it preferable mostly to –

- A) make sure things are arranged
- ✓ B) just let things happen

56. In relationships should most things be –

- A) renegotiable
- ✓ B) random and circumstantial

57. When the phone rings do you –

- ✓ A) rush to get to it first
- B) hope someone else will answer

58. Do you prize more in yourself –

- A) a strong sense of reality
- ✓ B) a vivid imagination

59. Are you drawn more to –

- A) fundamentals
- ✓ B) overtones

60. Which seems the greater error -

- A) to be too passionate
- ✓ B) to be too objective

61. Do you see yourself as basically –

- A) hard headed
- ✓ B) soft hearted

62. Which situation appeals to you more –

- A) the structured and scheduled
- ✓ B) the unstructured and unscheduled

63. Are you a person that is more –

- A) routinised than whimsical
- ✓ B) whimsical than routinised

64. Are you more inclined to be –

- ✓ A) easy to approach
- B) somewhat reserved

65. In writings do you prefer –

- A) the more literal
- ✓ B) the more figurative

66. Is it harder for you to –

- ✓ A) identify with others
- B) utilise others

67. Which do you wish more for yourself –

- A) clarity of reasoning
- ✓ B) strength of compassion

68. Which is the greater fault –

- A) being indiscriminate
- ✓ B) being critical

69. Do you prefer the –

- ✓ A) planned event
- B) unplanned event

70. Do you tend to be more –

- ✓ A) deliberate than spontaneous
- B) spontaneous than deliberate

My thanks for your time and attention! - Patrisha

YOU and YOUR ROLE In The MUSIC INDUSTRY

1: Please state your age:- 19

1a: Is your involvement in the music industry

| | | | |
|--|-----|-------------------------------------|-----------------------------|
| Full-time | Yes | <input checked="" type="checkbox"/> | <input type="checkbox"/> No |
| Supplementary (to a job outside the music industry) | Yes | <input type="checkbox"/> | <input type="checkbox"/> No |
| Student/Trainee | Yes | <input checked="" type="checkbox"/> | <input type="checkbox"/> No |

1b: If full-time, was it your first occupation Yes ☒ ☐ No
If No, what was your first occupation -

1c: If your music career is supplementary, what is your main occupation

1d: Please indicate which of the following best describes you

IF YOU ARE A PERFORMING ARTIST -

| | |
|--|-------------------------------------|
| Lead Vocalist | <input type="checkbox"/> |
| Other Vocalist | <input type="checkbox"/> |
| Featured Instrumentalist (eg: lead guitar, band-leader, section leader, etc.) | <input checked="" type="checkbox"/> |
| Other Instrumentalist | <input type="checkbox"/> |
| Independent "named" Session Player | <input type="checkbox"/> |

OTHER MUSIC INDUSTRY ROLES -

| | | | |
|----------------|--------------------------|---------------|--------------------------|
| Writer | <input type="checkbox"/> | Publisher | <input type="checkbox"/> |
| Produce | <input type="checkbox"/> | A & R Manager | <input type="checkbox"/> |
| Artist Manager | <input type="checkbox"/> | Artist Agent | <input type="checkbox"/> |
| Other * | | | |

* (Please state position/job title)

The Term Entrepreneur:

The concept of entrepreneurship was developed in 18th/19th century France: In 1755 Richard Cantillon's *Essai sur la nature du commerce en général* was probably the first published work to define the essence of the function of one described as an entrepreneur as being to *bear uncertainty*. To Cantillon the entrepreneur was someone who bought and sold at uncertain prices. During this era those economists with an interest in government saw the entrepreneur as a contractor, the specialist in agricultural economy saw him as a farmer,⁴⁷⁹ and those interested in manufacture⁴⁸⁰ saw him as a risk-taking capitalist. Drawing all these together a classical definition, still accepted, is that given by Jean Baptiste Say in *Traité d'Economie Politique* (1803). Jean Baptiste Say identified all *entrepreneurs* as risk takers with the capability to administer and superintend. By bringing together raw material, labour and capital, it is suggested, the entrepreneur acts with instinct and foresight. This is the description which, in economic terms, best fits music industry personnel (both Businessmen and artists). They undertake to incur initial costs and risks in the hope that the costs of production of goods (i.e. songs or recorded material) or services (performances) will be exceeded by the profit or future revenue. Risk-taking is inevitable since costs are initially unavoidable and it is always uncertain that revenue will exceed cost, or even if there will be any revenue at all.⁴⁸¹

In England the term entrepreneur did not come in to common usage until much later and this fact of development has an interesting and relevant influence on the development of both the economic and contractual classical models as discussed. In the 16th century English economic theorists describe *Merchant Adventurers*, but this class of description did not come into general use. In the 17th century the English term was *Undertaker* (of risks), and in the 18th century in *An Essay Upon Projects* Daniel Defoe makes use of the term *Projector* equivocal with inventor. But this Projector was also perceived as a fraud and a swindler by nature. Furthermore, and most relevant here, English theory was all based on a presumption that normality represented equilibrium. Individual variants in behaviour were supposed to be either cancelled out by aggregation or suppressed by competition, unmeasurable social or cultural factors such as *entrepreneurship* could not be modeled into the diagram. Rewards for risk taking and uncertainty could not be explained. Furthermore, conventional economic theory makes it difficult to draw a true

picture of an industry such as the music industry, where not just individuals but companies and conglomerates act solely as entrepreneurs. Conventional theory, both legal and economic, will assume timely, reactive adjustments to perfect market information in order to create or regain economic stability. In reality, however, it is not possible to gather perfect market information about either fashion trends on the high street or amongst eclectic populations when it comes to musical tastes, or, indeed, to predict the degree of volatility of the major component of the product, the artist. Although Jean Baptiste Say distinguished between capital which earns dividend and enterprise which earns profit it would seem that neo-classical economists paid little or no attention to entrepreneurship during the 19th century and this has affected both political and legal philosophical development in this area. It is not necessary here to follow this debate any further. It is, however, necessary to have made note of the selected meaning of the term entrepreneur and of the difficulties the concept has carried in conventional paradigm drawing. In short there is no accurate design for monitoring the risk/cost behaviour pattern of a purely entrepreneurial business structure.

END NOTES

⁴⁷⁹ Baudcau N.; *Première introduction à la philosophie économique*; circa 1770: cited entrepreneurs as risk takers and innovators in the sphere of agricultural development.

⁴⁸⁰ Turgot A.R.J.; *Réflexions sur la formation et la distribution des richesses*, circa 1774: defined the entrepreneur in manufacture as one who risked capital.

⁴⁸¹ The insurable risk factors such as at open air events are beyond the scope of this discussion.

APPENDIX NOT COPIED
ON INSTRUCTION FROM
UNIVERSITY

The Nature of Record Companies:

Under the heading 'Sony President Looks Ahead', the 1997 Annual Report for Sony Corporation addressed the question "What kind of company do you want Sony to be?"

Nobuyuki Idei responded:

Basically I want Sony to be a company that makes dreams come true for all the people we come in contact with, We want to continue to supply products that fulfil the dreams of our customers world-wide, for example. We also want to attract people with creative talent, such as musical artists, movie directors and game creators, and help them realise their own dreams. And this process leads to the creation of new dreams.

Sony is entering fields of business that bring together an unprecedented variety of activities. This is why we have to develop our own distinctive management methods. We are one of the few companies in the world that has leading strengths in both electronics and entertainment. These strengths enable us to develop businesses in a comprehensive manner. Spanning barriers between nations and languages as well as the divisions between electronics and entertainment, our activities are all driven by a common objective: to make dreams come true. While I am president I intend to expand further on this image I have for the Sony of tomorrow, and to create a system to promote the truly global management of this company.⁴⁸²

Music group sales for Sony that year had increased 14% to ¥585 billion, achieved through the activities of Sony owned Columbia Records, Epic Records Group, Red Distribution, Relatively Entertainment, Sony/ATV, music publishing, Sony Classical, Sony Music Independent labels (SSO Music, Crave, The Work Group) Sony Music International, Sony Music Nashville Ltd. and associated labels.⁴⁸³

By comparison, in 1998 the EMI Group reported that costs of sales as a percentage of turnover and total costs was consistent year-on-year. Music publishing royalty costs had fallen slightly but this had been off-set by increased marketing and promotion spend in recorded music.⁴⁸⁴ This report also confirmed performance related commitments to pay advances to artistes and repertoire owners amounting to some £361.4 million by 31

March 1998. But this well established and longstanding group made no preliminary promise of dream-granting or wish-making in association with this compulsory business report. It could be speculated that in an industry about which the media is traditionally ready to pass gossip and derogatory comment, the older group of companies habitually refrain from such enthusiastic soul baring.

As the industry progresses into a new generation, dominated not by 'majors' but by 'mega-companies' the media continues to sting. For example during late 1999 – early 2000 the media driven anticipation over the effects of the Time-Warner take-over of EMI Group might have lead to the innocent bystander to expect most unsatisfactory results. Nigel Cope, Associate City Editor for The Independent wrote:

*Agents and managers say EMI's most powerful stars, which include the Rolling Stones, the Spice Girls and Radiohead, are likely to have change-of-control clauses in their recording contracts that could be renegotiated. Although the merger has been carefully constructed as a 50:50 joint venture, artists' lawyers are likely to argue that Warner's greater boardroom representation in the enlarged company gives the US company effective control. If large numbers of artists seek new contracts, it could dramatically increase EMI's costs or lead to widespread defections.*⁴⁸⁵

Perhaps there are echoes of George Michael's feelings toward the Sony take-over of CBS inherent in Nigel Cope's sensationalising comments. The fact that the suggestion of impending defection was misplaced is evidenced in a later edition of The Independent where journalist David Usborne exposed the nature of Chairman and Chief Executive Officer of Warner Music Group, Roger Ames. Under the Heading *Quiet Rocker, High Roller* Usborne writes:⁴⁸⁶

Three Saturdays ago, Roger Ames, a few months into his reign as head of Warner Music, jetted into London from New York . . . with a huge secret in his brief case . . . and waited for one of the few other people also in the know to show up. . . This was Ken Berry, the chairman of EMI Music and one of Mr. Ames' oldest friends.

Mr. Berry revealed they had a problem. The secret was not so secret any more, while they were planning to go before the London press and leading music

industry analysts first thing on Monday morning to reveal all, it seemed that the Los Angeles Times and at least one British newspaper had advance word. . . . The two men were about to shake hands on the £12 billion merger of their companies to create the number one music giant in the world. And Mr. Ames was to be the chief executive of the new company.

This could have been the moment for serious tantrums. Instead Mr Ames did something friends say illustrates why he is so popular in business. He spent the next two hours ringing as many of the artists and producers as he could find – the people who actually supply Warner with the goods that sell the records – to tell them what was happening. He didn't want them finding out second-hand through the press in stories likely to contain important inaccuracies.

Subsequent to the merger, the Time-Warner internet site has been a mass of enthusiastic press releases, executive speeches and positive statements about technology and future opportunities. Later in his piece Usborne also reports that Roger Ames, earlier in his career, while in charge of Polygram music world-wide, spoke up at a meeting attended by Polygram's senior executives and consultants from a Boston company, apparently he:

asked a consultant who he thought Polygram's customers were. The consultant said they were the buyers of music CDs and the company's shareholders. "Wrong, it's the [f] artists," Mr. Ames exploded. "They're our customers. And if we do what you're proposing we won't have any [f*] records to put out in the first place."*

A general reading of Mr. Ames personality suggest that the 'old school' personality traits of music industry executives, those like Walter Yetnikoff, are still strongly in place in at least one of the mega-companies going forward into the 21st century. The industry is inevitably changing it's product distribution and marketing but with the new generation of Japanese dream makers and US stalwarts in such influential posts, it is speculated here that long-term relationship habits, founded in the post music hall days of payola developed throughout the last four decades, will continue to lead to volatile love/hate fall-outs such as those studied here.

END NOTES

⁴⁸² Sony Corporation Annual Report 1997, p5

⁴⁸³ *ibid.* p 11

⁴⁸⁴ EMI Group Annual Report 1998, p13

⁴⁸⁵ www.Independent.co.uk/news/Business; 26 January 2000; p1

⁴⁸⁶ The Independent; Business Review; 16 February 2000, p1-2

Third Party Rights:

There is no intention here to enter in to a full discussion about the effects of agency where a third party is, to all intents and purposes deliberately, empowered to act on behalf of a principle. It is recognised that many of the relationships between advisors and artists in the music industry are *prima facie*, in ordinary parlance, agency relationships. However for the time being, it is felt here that the independent status of the advisor, whether he be solicitor, manager or otherwise, would, at present be maintained in an argument at law. In other words he remains an independent third party.

To date, the general common law rule has been that only a party to a contract can enforce rights or duties conferred by that contract. This is known as the doctrine of *privity*. A party to a contract can be identified as one giving good consideration (price, duty or detriment in exchange for the other's price, duty or detriment). A bare promise (in exchange for nothing) a duty, price or detriment already owed or a duty, price or detriment past, (past consideration) cannot, in common law theory become good consideration, and therefore cannot make up an offer or constitute an act of acceptance and therefore cannot be part of the formation of a legally binding contract.

However, despite the doctrines of *privity* and *consideration*, the enforcement of third party rights for benefit is by no means an entirely new concept. For example in *Shadwell v Shadwell*⁴⁸⁷ an uncle promised to pay £150 to his nephew on the marriage of the nephew to Ellen Nicholl to whom the nephew was already engaged. This case can be interpreted to suggest that performance of the contractual duty to marry, already owed by the nephew to Ellen Nicholl, was good consideration for the uncle's promise and was, somehow, a benefit to the uncle. Therefore the uncle's promise to pay was enforceable. (There was some doubt in that case as to the uncle's intention to become contractually bound). More recently in *The Eurymedon*⁴⁸⁸ a firm of stevedores unloaded goods from a ship as they were already contractually bound to do for the ship owners. Some of the goods belonged to a third party who, prior to the unloading, stated that he would not sue the firm for such damages as might be caused to his goods during the unloading. It was found that the unloading of the goods was consideration for the promise not to sue,

despite the fact that they had to be unloaded anyway as per the contract with the ships owner. Both of these cases illustrate *performance of a duty already owed* and enforcement of third party intervention to that performance.

Where there is a mere *promise* rather than completion of performance the situation has vacillated: Initially the mere promise was thought not be sufficient *Jones v Waite* (1839). This case concerned a promise by *A* to *C* pay a debt already owed, by *A*, to *B*. The common law view seemed to be that the promisor, *A*, suffered no detriment via the promise and the promisee *C* stood to make no direct gain. *C* was seen as a third party intervening in the contractual obligations owed by *A* to *B*. However, the promisee, *C*, may in fact have a vested interest in *B* (to whom the original contractual debt or work is owed), for example the promisee may benefit from the promisor carrying out his (original) contractual obligation with the other party in order that the other party be placed in a position, gaining goods or finance, to trade with the promisor - therefore the promisee becomes a third party beneficiary to the contractual obligation already owed by the promisor to the other. Indeed, in *Pao On v Lao Yiu Long*⁴⁸⁹ it was recognised that *C*'s promise to guarantee against potential losses if *A* carried out his contractual obligations with *B* was enforceable. The contract *A+B* pre-existed, and *A* subsequently threatened not to perform without that promise of guarantee from *C*, but *C* was a party of shareholders in *B* who stood to benefit from the *A+B* contract.

There may be other types of vested interest in the performance of a contract for the benefit of a third party. As non-commercial interests these may, under common law, fall victim of the doctrine of *privity* and remain unenforceable: For example in *Beswick v Beswick*⁴⁹⁰ a Nephew purchased his Uncle's coal merchant business, as part of the purchase agreement he promised to pay an annuity to his Aunt after the Uncle's death. He failed to make the payments and the Aunt could not enforce them in her own right as she was not a party to the contract - however she did enforce the payments under her capacity as administrator to the Uncle's estate as she was thus empowered to act 'on his behalf'. Effectively this amounts to the party to the contract obtaining an order for specific performance which effectively ensures the third party benefit is received as a

matter of course. A difficulty arises where specific performance is not the remedy as in *Jackson v Horizon Holidays Ltd.*⁴⁹¹ where a husband sued for damages for a family holiday which was less than satisfactory. The defendant holiday company did not dispute that they were liable to the husband - with whom they had contracted to provide the holiday - but did dispute that they owed any liability to the other three members of his family. Lord Denning said:

In this case it was the husband making a contract for the benefit of himself, his wife and his children. . . In short a contract for the benefits of third persons,

He was prepared to enforce damages against the loss of benefits to the third parties. However, James LJ., while he upheld the award of extra damages, did so on the basis that the husband had contracted for a 'family holiday', thus avoiding conflict with the doctrine of *privity*. Later in *Woodar Investment Development Ltd. v Wimpey Construction UK Ltd.*⁴⁹² the House of Lords criticised Lord Denning - although they did not overrule him.

In *St. Martin's Property Corp. Ltd. v Sir Robert McAlpine & Sons Ltd.*⁴⁹³ the House of Lords were faced with a case where a builder had done negligent work on a property which did not come to light until after the property had been sold. Lord Browne-Wilkinson said that it was foreseeable in the contract, given the nature of the property, that it would be sold into third party hands and that any damage caused by a breach on the part of the builders would cause substantial loss to the third party at a later date.

Clearly the cases above show that the judiciary have shown great respect for common law and the doctrines of *privity* and *consideration* while appreciating where the true losses lie. However, no discussion is apparent in this early stage of the development of this area of law as to the reciprocal liability of these third parties. It is believed here that the enjoinder and empowerment which may be brought about by the Contracts (Rights of Third Parties) Act 1999 must eventually become a two way attraction.

END NOTES

⁴⁸⁷ (1860) 9 C.B. (N.S.) 159
⁴⁸⁸ [1975] A.C. 154: followed in *The New York Star* [1981] 1 W.L.R. 138.
⁴⁸⁹ [1980] A.C. 614
⁴⁹⁰ [1967] 2 All ER 1197
⁴⁹¹ [1975] 3 All ER 92
⁴⁹² [1980] 1 All ER 571
⁴⁹³ [1993] 3 All ER 417

Relevant Cases:

Panayiotou and Others v Sony Music Entertainment (UK) Ltd.[1994] EMLR 229

Nicholl and Another v Ryder (1998) QBD U980659

Nicholl and Another v Ryder [1999] CA 2991221901

Zang Tumb Tuum Records Limited and Another v Johnson [1993] EMLR 61

Note:

To avoid excess bulk, other relevant cases have not been included but are readily available in the All England Law Reports.